United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

WILBUR K. MILLER

10/27/66
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10 00 am

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,995

ROBERT A. SCHMITZ,

v.

SOCIETE INTERNATIONALE, etc., and
HENRY H. FOWLER, Secretary of the Treasury,

Appellees.

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No. 19,996

HERMAN A. SCHMITZ, et al.,

Appellants,

v.

SOCIETE INTERNATIONALE, etc., and
HENRY H. FOWLER, Secretary of the Treasury,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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C.A. No. 1900-65

DOCKET ENTRIES

1965

Aug. 5 —	Complaint, appearance	filed
Aug. 5 —	Summons copies (1) and copies (1) of complaint issued to Defendant #1 registered returned receipt received 8/18/65 (Switzerland)	filed
Aug. 5 —	Summons, copies (3) and copies (3) of complaint to Defendant #2 & U.S. Attorney Ser 8/6/65; Attorney General ser 8/9/65	filed
Aug. 5 —	Request by Attorney for pltf for service by registered airmail on deft. #1 & Exhibit	filed
Aug. 5 —	Certificate of Clerk as to service by registered mail to Deft #1 (Reg. Receipt #325869)	filed
Aug. 27 —	Summons, copy (1) & copy (1) of complaint issued to #1, N.F. 9/17/65	filed
Sept. 7 —	Motion of defendant #1 to dismiss action and/or to quash return of service of summons c/m 9/7/65, Exhibit, Affidavit; Exhibit; memorandum; Appearance of Whiteford, Hart, Carmody & Wilson MC	filed
Sept. 16 —	Opposition of plaintiff to motion of defendant #1 to dismiss and or quash return of service; c/m 9/15/65; exhibit A	filed
Oct. 4 —	Appearance of Robert J. Wieferich for defendant #2	filed
Oct. 5 —	Extension of time for defendant #2 to answer complaint to and including 10/15/65	filed
Oct. 15 —	Motion of defendant to dismiss; P&A's, c/m 10/15/65 MC	filed
Oct. 25 —	Stipulation extending time for plaintiff to oppose motion of defendant #2 to dismiss to and including 11/10/65	filed

Nov.	10	Opposition of plaintiff to motion of defendant #2 to dismiss; c/m 11/10/65	filed
		1966	
Jan.	11 —	Affidavit of Dr. Alfred Schaefer	filed
Jan.	11 —	Motion of Def. #1 to quash service and or to dismiss argued and taken under advisement	Pine, J.
Jan.	11 —	Motion of Def. #2 to dismiss argued and taken under advisement	Pine, J.
Jan.	18 —	Transcript of proceedings 1/11/66, pp. 1-110	filed
Jan.	19 —	Letter dated 1/12/66 from John J. Wilson to Judge Pine re: cases cited during argument	filed
Jan.	19 —	Memorandum opinion dismissing complaint (Order to be presented)	Pine, J.
Jan.	25 —	Order dismissing complaint with prejudice (N)	Pine, J.
Jan.	25 —	Notice of Appeal of plaintiff on judgment of 1/25/66, copies mailed to J. J. Wilson and Robert J. Wieferich	filed
Feb.	2 —	Cost bond on appeal in amount of $250.00 with Hartford Accident & Indemnity Co., approved & filed	Sirica, J.

[Filed August 5, 1965]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT A. SCHMITZ 111 Brookside Drive Greenwich, Connecticut	)	
v.	)	Civil Action No. 1900-65
SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., also known as INTERNATIONAL INDUSTRIE UND HANDELSBETEILIGUNGEN, A.G. Peter Marianstrasse 19 Basel, Switzerland	)	
and	)	
HON. HENRY H. FOWLER Secretary of the Treasury of the United States Washington 1, D. C.	)	

COMPLAINT FOR INJUNCTION, MONEY JUDGMENT, AND OTHER RELIEF

First Count

1. Plaintiff, Robert A. Schmitz, is a citizen of the United States and is a resident of the State of Connecticut. The corporate defendant, commonly known in the past as I.G. Chemie, Societe Internationale Pour Entreprises Chimiques et Commerciales, S.A. or Internationale Industrie und Handelsbeteiligungen, A.G., and more recently as Interhandel, and hereinafter so designated, is a corporation organized and existing under the laws of Switzerland. A fund in the Treasury of the United States is credited to its name and is within the jursidction of this Court. Defendant Henry H. Fowler, is Secretary of the Treasury of the United States.

2. This Court has jurisdiction of this case by reason of the provisions of Section 11-521 and Section 13-336 of the District of Columbia Code (1961 ed. Supp. IV), the general equity powers of the Court in rem over a fund within the District of Columbia, and personal jurisdiction over defendant Secretary of the Treasury to control the exercise of his ministerial duty.

3. A fund of approximately one hundred twenty-one million dollars ($121,000,000.00) has been deposited in the Treasury of the United States for the credit of defendant, Interhandel, upon which plaintiff has an equitable lien for services performed in the employ of defendant corporation as its agent in the creation and preservation of this fund. The United States has no interest in the fund and the defendant Secretary of the Treasury is in the position of a stakeholder to disburse the fund as the interests of claimants appear or as adjudicated by this Court.

4. The fund was derived from the recent sale to the public of 11,166,438 shares of stock of General Aniline and Film Corporation, (hereinafter sometimes referred to as "G.A.F.") a corporation organized and existing under the laws of the State of Delaware. These shares represent the stock of the company that was originally owned and controlled by defendant Interhandel from its incorporation until 1942. On February 15, 1942, the Secretary of the Treasury issued a Vesting Order seizing the shares as the property of an allegedly enemy-controlled corporation. The Secretary transferred the stock to the Alien Property Custodian on April 24, 1942, who transferred it to the Attorney General of the United States on October 15, 1946. In 1948, defendant Interhandel instituted a suit against the Attorney General in the United States District Court for the District of Columbia in Civil Action No. 4360-48. A stipulation settling the suit ultimately was entered into, under the terms of which the stock was sold to the public and the proceeds thereof were divided between Interhandel and the United States in agreed proportions. It is Interhandel's share of

the proceeds that consitutes the fund in the United States Treasury, which is the object of this suit.

5. For many years plaintiff had been intimately acquainted with the affairs of General Aniline and Film Corporation and its relationship to defendant Interhandel. His father, Dietrich A. Schmitz, now deceased, was President and Chairman of the Board of Directors of General Aniline and Film Corporation from its formation in 1939 until its vesting by the United States government in 1942. The said Dietrich A. Schmitz also had served as the principal officer of G.A.F.'s predecessor corporation. Defendant Interhandel had reposed entire confidence in him in all of its large investments in this country and had given him complete control of G.A.F. After General Aniline and Film Corporation's seizure, Dietrich A. Schmitz spent virtually the rest of his life resisting the attempts of the government to maintain and justify the seizure. Plaintiff worked closely with his father in the latter's constant dealings with defendant Interhandel. Over the course of the years plaintiff acquired an intimate knowledge of the complicated relationship between defedant Interhandel and its owners and managers, and earned the friendship and trust of the said owners and managers, particularly of Dr. Hans Sturzenegger, the principal stockholder. The officers of defendant Interhandel came to rely on plaintiff's knowledge and judgment of the intricacies and vagries of American policies and the personalities of key American officials, especially as they related to the varying hopes and fears of the Swiss owners of G.A.F. and the prospects of salvaging their enormous investment in their United States subsidiary, General Aniline and Film Corporation.

6. A number of American corporations sought to buy defendant Interhandel's interest in G.A.F. because it was a valuable property and because they judged that an American corporation would be in a better position than a foreign corporation to obtain the return of the seized stock. Defendant Interhandel gave serious consideration to several proposals. From 1957 throug 1958, plaintiff was, with the consent and

encouragement of Interhandel, successively authorized to act, and did act, on behalf of Remington Rand, Inc., Atlas Corporation, Shields and Co., W. R. Grace & Co., and Food Machinery and Chemical Corp., and, in anticipation of substantial fees and commissions, expended a great deal time, money and effort to bring about such a purchase.

7. In December, 1958, while plaintiff was in Switzerland carrying on negotiations between the aforementioned Food Machinery and Chemical Corp. and defendant Interhandel, he was told by Dr. Hans Sturzenegger, that defendant Interhandel had finally decided not to sell its interest in General Aniline and Film Corporation until it had brought to a conclusion its claim against the United States government. Because the law suit in which it was then engaged seemed endless and because it felt that the handling of its claim had blackened its image and prejudiced its interests, defendant corporation decided that it would itself negotiate with the United States government for return or compensation through an agent of its own choosing. Such agent would have to be of the highest standing and reputation. Plaintiff's cooperation in effecting these arrangements were solicited by defendant Interhandel. Plaintiff suggested the name of Charles E. Wilson, (hereinafter "Mr. Wilson"), formerly President of the General Electric Company. He had been a high government official and was then President of the People to People Foundation, to which position he had been appointed by President Eisenhower. Plaintiff was personally acquainted with Mr. Wilson, and suggested his name as Interhandel's representative because he enjoyed the confidence and respect of the highest United States government officials and could therefore negotiate at the highest levels. Plaintiff reported to Interhandel after conferences with Mr. Wilson that he could be persuaded to act only if he were offered full powers as trustee to negotiate a settlement of the dispute upon such terms and conditions as would appear honorable and just to him. The trusteeship would afford defendant Interhandel complete protection and a full accounting of the trustee's transactions and such powers

would be terminable only upon the achievement of the objective. Plaintiff's suggestion was accepted and he was asked to attempt to bring about the trusteeship of Mr. Wilson. Dr. Sturzenegger made it clear, however, that, in the event the trusteeship could not be established, neither he nor defendant Interhandel wanted a written record of the plan or of the plaintiff's commission.

8. During these same meetings with Dr. Sturzenegger and other agents of defendant Interhandel in December, 1958, plaintiff pointed out that adoption of this new approach would disable him from earning the fees and commissions on the purchase of defendant Interhandel's interest for which he had worked so hard for so many years; that bringing about the Wilson trusteeship would be of great value and importance to defendant Interhandel; and that it would take much time, travel and effort to give Mr. Wilson the necessary background, persuade him that defendant Interhandel 's cause was just, and induce him to undertake the trusteeship. For these reasons, plaintiff asked for a fee from defendant Interhandel for bringing about the Wilson trusteeship equal to five per cent of the proceeds to defendant Interhandel of such settlement as defendant Interhandel and the United States government might reach. Dr. Sturzenegger agreed that defendant Interhandel would pay plaintiff a fee for bringing about the Wilson trusteeship, and suggested that two per cent or three per cent would be more acceptable to defendant Interhandel's stockholders. Plaintiff did not consent and no agreement was reached on that occasion regarding the amount or percentage to be paid to plaintiff, but the clear understanding was that such fee should not be less than two or three per cent of the total sum obtained.

9. Plaintiff then proceeded with his efforts to bring about the trusteeship of Mr. Wilson. From the end of November, 1958 until May 23, 1960, when Mr. Wilson accepted the trust powers, a period of eighteen months, plaintiff devoted almost all of his time, attention, and his own money resources, as well as much travel to bringing about

the desired result. This entailed three trips to Switzerland by plaintiff to confer with officials of defendant Interhandel, and defendant Interhandel sent its representatives to New York three times to confer with plaintiff and Mr. Wilson. In confirmation that plaintiff was acting for defendant Interhandel as its authorized agent in these negotiations, defendant Interhandel, in May of 1960, reimbursed plaintiff $13,733.00 for out-of-pocket expenses. Plaintiff's task was extraordinarily difficult. Among other things, it was necessary for plaintiff to accomplish the following: (a) to provide the essential background to persuade Mr. Wilson of the factual truth of defendant Interhandel's position in the dispute, (b) to convince Mr. Wilson of the good faith and integrity of defendant Interhandel's management, (c) to induce Mr. Wilson to accept the feasibility of the trust approach, (d) to prevail upon Mr. Wilson to commit his time, energy, and reputation to the effort, (e) to bring Mr. Wilson together with defendant Interhandel's owners, managers, and agents, in meetings in New York and Paris, (f) to maintain both trust and contact between defendant Interhandel and Mr. Wilson during a change in defendant Interhandel's stock ownership and management, and during a period of publicity which reflected badly upon the good faith of defendant Interhandel's management, (g) to give body and substance to the trust idea, and (h) to draft a resolution of the Executive Committee of Interhandel's Board of Directors, an option contract, and a Power of Attorney acceptable in form and substance both to Mr. Wilson and to defendant Interhandel. Plaintiff, by tenacious efforts successfully accomplished all these tasks. A copy of the Resolution, Contract and Power of Attorney, signed by Mr. Wilson and Interhandel, are appended hereto as Exhibits A, B and C respectively.

10. Mr. Wilson agreed to serve as trustee, and exercised his powers as such, because he believed in defendant Interhandel's cause and regarded the confiscation of G.A.F. as contrary to United States' interests, illegal, immoral and unwise. It was through the efforts of plaintiff that Mr. Wilson was so convinced. Mr. Wilson was to receive no

compensation for his services as trustee. The only compensation which defendant Interhandel undertook to pay, therefore, was the compensation to plaintiff, except that defendant Interhandel also paid the trustee's attorney for legal services rendered to the trustee.

11. On or about October 26, 1959, Dr. Alfred Schaefer, chief executive and chairman of the executive committee of defendant Interhandel, confirmed the preliminary arrangement made by Dr. Sturzenegger with plaintiff and resolved the matter of compensation by agreeing that defendant Interhandel would pay plaintiff for the services he had performed 5% of any monies which defendant Interhandel might receive in settlement of its dispute with the United States government, payment to be made when the settlement funds due Interhandel became available. Dr. Schaefer stated that defendant Interhandel had no other source from which it could compensate plaintiff, and that this compensation would necessarily have to come out of the specific settlement proceeds of the subject matter of this dispute with the United States government. Plaintiff did not ask for a writing because Dr. Schaefer insisted that the previous understanding be followed and absolute secrecy be maintained. Mr. Schaefer emphasized that defendant Interhandel did not wish to inform or reveal the plan even to its lawyers, because of its vital, sensitive and uniquely confidential nature.

12. On May 23, 1960, Mr. Wilson accepted the trust powers, and plaintiff promptly communicated by transatlantic telephone the news of the acceptance to defendant Interhandel. Plaintiff had then done everything he was required to do to discharge his obligation under the contract.

13. Following Mr. Wilson's acceptance of the trust powers, and with plaintiff's continuous active cooperation, he entered into intensive negotiations with the highest officials of the United States government in an effort to convince them of the merits of defendant Interhandel's claim and the unfairness and injustice of the government's resistance thereto. Largely as a result of these efforts the image of defendant

Interhandel was changed in the United States government circles, the most influential government officials were persuaded that justice demanded the recognition of its claims, the prompt settlement of Interhandel's suit was greatly facilitated and the favorableness of the terms were greatly enhanced.

14. Defendant Interhandel and the stockholders would be unjustly enriched at the expense of the plaintiff if they were to receive the entire proceeds of the settlement of its claim against the United States without compensating plaintiff for his efforts and the results he obtained.

15. The payment to defendant Interhandel made by the United States of America under the settlement of the suit mentioned in Paragraph 4 above is approximately $145,000,000.00. Accordingly defendant Interhandel is indebted to plaintiff in the amount of $7,250,000.00, and plaintiff has a lien on the fund in the United States Treasury for that amount.

Second Count

1, 2, 3, 4, 5, 6, 7. For purposes of this Count, plaintiff incorporates herein by reference, paragraphs 1, 2, 3, 4, 5, 7 and 10 of Count One.

8. Following Mr. Wilson's acceptance of the trust powers, and from June 1, 1960 through December 31, 1961, plaintiff performed, almost continuously, a great amount of work for defendant Interhandel. This work included assisting, advising, and providing factual material to the trustee and his counsel; liaison between them and the defendant Interhandel's management; reporting on and interpreting to the defendant Interhandel's management, the work of the trustee and American views, policies, circumstances, conditions and events; received interested Swiss visitors to the United States, including representatives of defendant Interhandel; and other tasks of importance on both sides of the Atlantic. This work commanded substantially all of plaintiff's time,

thought, effort and attention, involved considerable travel, and required plaintiff to be available at all times. It precluded attention to other business matters. Plaintiff's capability to perform this work was unique.

9. It was understood between plaintiff and defendant Interhandel that plaintiff would be compensated by defendant Interhandel for the work described in paragraph 8 of this Count. No final agreement was reached regarding the amount or rate of compensation. Plaintiff's work was solicited by defendant Interhandel and valuable to it.

10. The services that plaintiff performed from June 1, 1960, to December 31, 1961, had a reasonable value of $150,000.00. In fact, defendant Interhandel paid plaintiff only $38,000.00, which has been accepted by him merely as a payment on account, and has reimbursed plaintiff only partially for his expenses.

11. There is due and owing from defendant Interhandel to plaintiff the sum of $112,000.00.

WHEREFORE, the premises considered, plaintiff demands:

1. That a rule to show cause be issued against defendant Secretary of the Treasury, to show cause why he should not be enjoined from disbursing any portion of the fund derived from the sale to the public of the stock of General Aniline and Film Corporation that had been seized and vested by the United States government, which fund is now held in the Treasury of the United States, unless and until provision is made for satisfying plaintiff's claims, and upon return of the rule to show cause, that the defendant Secretary of the Treasury be enjoined from making such disbursement.

2. That, if necessary, a receiver be appointed to receive and hold a sum of seven million three hundred sixty-two thousand dollars ($7,362.000.00) from said fund pending determination of plaintiff's complaint for mandatory injunction against defendant Secretary of the Treasury.

3. That seven million, three hundred sixty-two thousand dollars ($7,362,000.00) of said fund in the Treasury of the United States be

declared to be a trust for the benefit of plaintiff and the amount found due to him be ordered to be paid to him.

4. That process issue against defendant Interhandel, by publication, so that it be caused to appear and answer the exigencies of this complaint.

5. That judgment be entered against defendant in the amount of $7,250,000.00 plus interest from April 14, 1965, and in the further amount of $112,000.00 plus interest from December 31, 1961.

6. That the Court afford such other or further relief as the exigencies of the case may require.

Robert A. Schmitz

O'DONOGHUE & O'DONOGHUE

By
Ross O'Donoghue
520 Union Trust Building
Washington, D. C. 20005
Attorneys for Plaintiff

STATE OF CONNECTICUT)
COUNTY OF) ss.

I, Robert A. Schmitz, do depose and say that I have read the foregoing Complaint for Injunction, Money Judgment, and Other Relief, subscribed by me, and know the contents thereof; that the matters and things stated therein of my own personal knowledge are true and those stated on information and belief I believe to be true.

Robert A. Schmitz

Subscribed and sworn to before me this ___ day of _____, 1965.

Notary Public

[Filed August 5, 1965]

PRAECIPE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

the 5th day of August, 1965

Robert A. Schmitz

vs.

Societe Internationale Pour Participation Industrielles et Commerciales, S.A. et al.

Civil Action No. 1900-'65

The Clerk of said Court will please send by registered airmail the attached copy of the complaint in the above entitled case to the defendant, Societe Internationale Pour Participations Industrielles et Commerciales, S.A., a.k.a. Internationale Industrie Und Handelsbeteiligungen, A.G. at the address indicated in the caption, and request a return receipt therefore by airmail. This service is to be effected in accordance with the provisions of Rule 4(i)(1)(D).

/s/ ROSS O'DONOGHUE

520 Union Trust Building
Washington, D.C.

Attorney for Plaintiff

[Filed August 5, 1965]

PRAECIPE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

the 5th day of August, 1965

Robert A. Schmitz

vs.

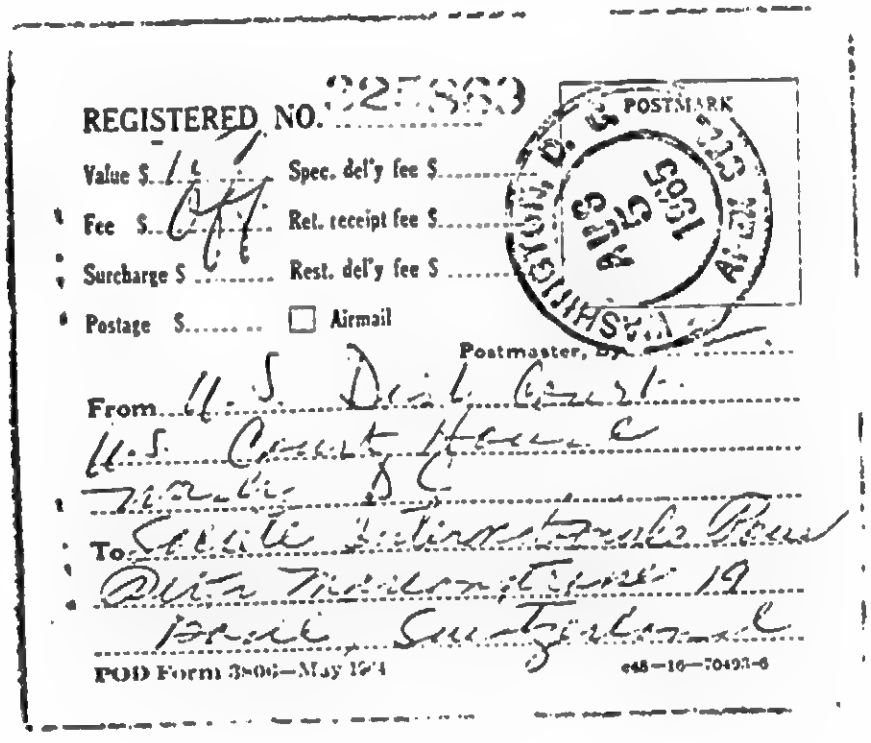
Societe Internationale Pour Participation Industrielles et Commerciales, S.A. et al.

} Civil Action No. 1900-65

I hereby certify that I have this 5th day of August, 1965 by registered mail, return receipt requested, sent to Societe Internationale Pour Participation Industrielles et Commerciales, S.A. etc., a copy of the summons and complaint.

HARRY M. HULL, Clerk

/s/ ELEANOR E. JOBE
Deputy Clerk



[Filed September 7, 1965]

MOTION OF DEFENDANT, SOCIETE INTERNATIONALE POUR DES PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A., TO DISMISS ACTION AND/OR TO QUASH RETURN OF SERVICE OF SUMMONS

Comes now the defendant, Societe Internationale Pour des Participations Industrielles et Commerciales, S.A. (Interhandel), by its attorneys, appearing specially, and moves this Court, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, to dismiss this action and/or to quash the return of summons purported to have been served upon it by mail received in Switzerland August 18, 1965, under Rule 4 (i) of the Federal Rules of Civil Procedure, on the ground that such purported service is a nullity because it is predicated upon the assumed existence of a res in the District of Columbia and upon a claim to or lien upon such res on the part of the plaintiff, none of which actually exists, as is shown by the affidavits of Dr. Alfred Schaefer (true copy attached, executed original en route from Switzerland) and John J. Wilson, hereto annexed and made a part hereof; and upon the further grounds that, in any event, substituted service in this type of action is insufficient; and the Court lacks jurisdiction over the person of this defendant.

WHITEFORT, HART, CARMODY & WILSON

By /s/ John J. Wilson

Address: 815 - 15th Street, N. W.
Washington, D.C. 20005

Attorneys for defendant Societe Internationale Pour des Participations Industrielles et Commerciales, S.A. Appearing specially for the purpose of this motion, and for no other purpose.

I hereby certify that on the 7th day of September, 1965, copies of the foregoing Motion, annexed affidavits and supporting memorandum were mailed, postage prepaid, to Messrs. O'Donoghue & O'Donoghue,

attorneys for the plaintiff, Union Trust Building, Washington, D.C., and to the offices of the United States Attorney and the Attorney General in the District of Columbia, for the defendant Secretary of the Treasury.

/s/ John J. Wilson

[Filed September 7, 1965]

AFFIDAVIT OF JOHN J. WILSON IN SUPPORT OF ANNEXED MOTION TO DISMISS AND/OR TO QUASH

DISTRICT OF COLUMBIA, ss:

I, John J. Wilson, do solemnly swear that I was attorney of record for the defendant herein, Societe Internationale Pour des Participations Industrielles et Commerciales, S.A. (called Interhandel), in Civil Action No. 4360-48, in which Interhandel was plaintiff and the Attorney General and Treasurer of the United States were defendants; that there is attached hereto and made a part hereof a true and exact copy of the Stipulation of Settlement entered into by the parties and filed in said Civil Action, the terms and conditions of which govern and control funds and United States of America Treasury obligations, belonging to Interhandel, in the hands of the defendant Secretary of the Treasury; that the defendant Secretary is not a stakeholder of said funds and securities, as claimed by the plaintiff in his complaint, since, through the defendant Secretary in his official capacity, the United States Government holds them as collateral security for Interhandel's indemnity obligations under said Stipulation, subject entirely and only to the authority and direction of the Attorney General of the United States as to their disposition and disbursement. (See particularly Sections VIII and IX of the attached Stipulation.)

Further to show the absence of an equitable lien in favor of plaintiff under either the first or the second count of his complaint, and thus

to support the annexed motion to dismiss and/or to quash service of process, this affiant states as follows:

That he has been Interhandel's lawyer in the United States since Pearl Harbor, all in relation to (1) the anticipated seizure of General Aniline & Film Corporation, most of whose stock Interhandel owned, by United States Government officials; (2) the vesting of such stock; (3) the filing of claims for its return; (4) the maintenance of litigation which followed; and (5) the settlement of the case; and during the entire period he maintained constant contact, in one form or another, with United States Government officials having to do at the time with the foregoing subject matters.

Affiant has read the complaint filed in this case and denies the following averments of the complaint:

1. In paragraph 3 of the first and second counts, that plaintiff performed services in the creation or preservation of the fund referred to therein, as Interhandel's agent or otherwise.

2. In paragraph 13 of the first count, the averments contained in the last sentence thereof.

3. In paragraph 14 of the first count, the averment that plaintiff obtained any results that either contributed to the settlement of the case or proved to be advantageous to Interhandel.

John J. Wilson

Subscribed and sworn to before me this ___ day of September, 1965.

Notary Public, D. C.

[Filed September 27, 1965]

RETURN ON SERVICE OF WRIT

United States of America,)
District of Columbia) ss: CA 1900-65

I hereby certify and return that I served the annexed Summons & Complaint on the therein-named Societe Internationale Pour Participations Industrielles et Commerciales, S.A. also known as Internationale Industrie und Handelsbeteiligungen, A.G. by handing to and leaving a true and correct copy thereof with
Not to be found in my district in the said District on the 17th day of September, 1965.

LUKE C. MOORE
United States Marshal

Marshal's fees: $3.00

/s/ JEANETTA ANDERSON
Deputy

[Filed October 15, 1965]

MOTION OF DEFENDANT, THE HONORABLE HENRY H. FOWLER, SECRETARY OF THE TREASURY, TO DISMISS COMPLAINT

Comes now defendant, the Honorable Henry H. Fowler, Secretary of the Treasury, by the undersigned attorneys and moves the Court to dismiss the complaint herein for lack of jurisdiction and for failure to state a claim upon which relief may be granted for the following reasons:

1. This suit is an unconsented suit against the United States;

2. The plaintiff has failed to join the Attorney General of the United States, who is an indispensable party;

3. The plaintiff is attempting to obtain judicial relief with respect

to discretionary duties of an executive officer of the United States in violation of the separation of powers doctrine which relegates such duties exclusively to the Executive Branch of Government;

All as more fully set forth in the memorandum of defendant's points and authorities filed in support hereof.

Respectfully submitted,

Carl Eardley
Acting Assistant Attorney General,
Civil Division, Department of Justice

John C. Conliff, Jr.
United States Attorney

Dated: Oct. 15, 1965

Harland F. Leathers
Attorney

Robert J. Wieferich
Attorney

Attorneys, Department of Justice

[Filed January 11, 1966]

AFFIDAVIT IN SUPPORT OF DEFENDANT INTERHANDEL'S MOTION TO DISMISS COMPLAINT AND TO QUASH SERVICE OF SUMMONS

Dr. Alfred Schaefer being first duly sworn on oath deposes and states that he is the vice chairman of the board of directors of Interhandel; that he has read the complaint filed by Robert A. Schmitz against Interhandel civil action 1900-65 US District Court DC and denies many of the averments contained therein; and in support of Interhandel's motion as above described he specifically denies each and every statement made in the eleventh paragraph of the first count thereof.

Dr. Alfred Schaefer

Subscribed and sworn to before me this 6 day of September, 1965.

C.A. 2091-65

DOCKET ENTRIES

1965		
Aug. 27 —	Complaint (2), appearance	filed
Aug. 27 —	Summons copies (2) and copies (2) of complaint issued to Deft. #1 NF 9/17/65, #2 ser 8/30/65, DA ser 8/30/65, AG ser 9/15/65	
Aug. 27 —	Summons, copies (3) and copies (3) of Complaint issued to Deft. #2	filed
Aug. 27 —	Request by Attorney for Pltf. for service by registered airmail on deft. #1	filed
Aug. 27 —	Certificate of Clerk as to service by registered airmail to Deft. #1 (Reg. Receipt #326123)	filed
Sept. 20 —	Motion of deft. #1 to dismiss and/or quash return of service; memo; affidavits (2); exhibits (2); c/m 9/16/65; MC 9/20/65; appearance of Whiteford, Hart, Carmody & Wilson	filed
Sept. 29 —	Points and authorities of pltfs in opposition to motion of deft. #1 to dismiss or quash service; c/m 9/28/65	filed
Oct. 15 —	Motion of deft. #2 to dismiss; P&A; c/m 10/15/65; MC 10/15/65; appearance of Carl Eardley and Robert J. Wieferich	filed
Oct. 25 —	Stipulation of pltfs and deft #2 for extension of time for pltfs to file opposition to motion to dismiss to and including 11/10/65	filed
Nov. 10 —	Points and authorities of pltf in opposition to motion to dismiss; c/m 11/10/65; Exhibits A	filed
1966		
Jan. 11 —	Motion of deft #1 to quash service and/or to dismiss argued and taken under advisement	Pine, J.

Jan.	11	— Motion of deft #2 to dismiss argued and taken under advisement	Pine, J.
Jan.	18	— Transcript of proceedings 1/11/66, pp. 1-110 filed in CA 1900-65	filed
Jan.	19	— Letter dated 1/12/66 from John J. Wilson to Judge Pine re: cases cited during argument	filed
Jan.	19	— Memorandum opinion dismissing complaint (order to be presented) filed in CA 1900-65 (N)	Pine, J.
Jan.	25	— Order dismissing complaint without prejudice (N)	Pine, J.
Jan.	25	— Notice of appeal by pltf from order 1/25/66. Copies mailed to Weiferich and John Wilson	filed
Feb.	2	— Cost bond on appeal of pltfs in sum of $250.00 with Hartford Accident & Indemnity Co., approved (fiat)	Sirica, J.

[Filed August 27, 1965]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HERMAN A. SCHMITZ
79 Llewellyn Road
Montclair, New Jersey

ROBERT A. SCHMITZ
111 Brookside Drive
Greenwich, Connecticut

and

LLOYD J. VAIL
The Fairfield County Trust
Company Bld.
Greenwich, Connecticut,
Executors of the Estate of
Dietrich A. Schmitz, deceased

v.

SOCIETE INTERNATIONALE
POUR PARTICIPATIONS IN-
DUSTRIELLES ET COMMER-
CIALES, S.A. or
INTERNATIONALE INDUSTRIE
UND HANDELSBETEILIGUNGEN,
A.G.
Peter Marianstrasse 19
Basel, Switzerland

and

HON. HENRY H. FOWLER
Secretary of the Treasury of the
United States of America
Washington, D. C.

Civil Action No. 2091-'65

COMPLAINT FOR INJUNCTION, MONEY JUDGMENT, AND OTHER RELIEF

I, Plaintiffs, Herman A. Schmitz, Robert A. Schmitz and Lloyd J. Veil, are the duly qualified executors of the estate of Dietrich A. Sch-

mitz, deceased, having been appointed by the Probate Court for the District of Greenwich, Town of Greenwich, Fairfield County, Connecticut, on April 2, 1965. They are all citizens of the United States of America and residents of the states indicated by their addresses to this caption. The corporate defendant, commonly known in the past as I. G. Chamie or Societe Internationale Pour Enterprises Chimiques et Commerciales, S.A., or Internationale Industrie - Handelabeteiligungen, A.G., and more recently as Interhandel, and hereinafter so designated, is a corporation organized and existing under the laws of Switzerland. A fund in the Treasury of the United States of America is credited to its name and is within the jurisdiction of this Court. Defendant Henry M. Fowler is the Secretary of the Treasury of the United States.

2. This Court has jurisdiction of this case by reason of the provisions of Section 11-521 and Section 13-336 of the District of Columbia Code (1961 ed. Supp. IV), the general equity powers of the Court in rem over a fund within the District of Columbia, and personal jurisdiction over defendant Secretary of the Treasury to control the exercise of his ministerial duty.

3. A fund of approximately One Hundred and Twenty-one Million Dollars ($121,000,000.00) has been deposited in the Treasury of the United States for the credit of defendant Interhandel, upon which plaintiffs, as executors of the estate of Dietrich A. Schmitz, have an equitable lien for the services performed by decedent in his lifetime in the creation and preservation of this fund. The United States has no interest in the fund and the defendant, the Secretary of the Treasury, is in the position of stakeholder to disburse the fund as the interests of claimants appear or as adjudicated by this Court.

4. The fund was derived from the recent sale to the public of 11,166,438 shares of stock of General Aniline and Film Corporation, (hereinafter sometimes referred to as GAF) a corporation organized and existing under the laws of the State of Delaware. Said fund rep-

resents the proportionate share of the proceeds of said sale agreed to be paid to defendant Interhandel pursuant to a stipulation between defendant Interhandel and the Attorney General of the United States in settlement of a suit brought by the former against the latter for the return of such stock as will hereinafter be more fully set forth.

5. Decedent was a citizen of the United States of America at the time of his death and had been one since his naturalization in 1916. Beginning in 1930, decedent was asked by defendant Interhandel to represent it in all of its business interests in the United States and was authorized by it to invest very substantial sums of money in various American corporations.

6. In 1929 defendant Interhandel bought for $20,000,000.00 the preponderant controlling stock of American I.G. Chemical Corporation and, shortly after the issuance of that stock, bought $8,000,000.00 worth of its convertible debentures, subsequently converted into stock. Thereupon it owned approximately 464,000 class "A" common shares, and 2,050,000 class "B" shares, or approximately 90% of the voting shares of GAF. In 1937, decedent bought on behalf of American I.G. Chemical Corporation, a controlling interest of some 31% of the stock of Agfa Asco Corporation. In 1939 General Aniline and Film Corporation was formed by merging American I. G. Chemical Corporation with Agfa Asco Corporation and General Aniline Work, Incorporated.

7. Defendant Interhandel owned the same controlling stock interest in GAF that it had held in the predecessor corporation and dececent was, from the date on which General Aniline and Film Corporation was formed, President of the new corporation as well as Chairman of its Board of Directors, fully representing Interhandel's controlling interest. Decedent held defendant Interhandel's proxies for all of the stock of General Aniline and Film Corporation which it owned. This full voting control enabled him to elect GAF's entire board of directors. Thus, decedent became and continued to be sole trustee and attorney-in-fact for defendant Interhandel, with complete responsibil-

ity for fostering and protecting its interests in GAF, as well as the principal executive officer of GAF. In this unique fiduciary capacity, decedent owed his principal, defendant Interhandel, the highest duties of loyalty and endeavor. He was never removed from any of these positions or relieved of his responsibilities by defendant Interhandel.

8. As president of General Aniline and Film Corporation, decedent, by reason of his own personal acquaintance, high standing in the American business community, and powers of persuasion, assembled a distinguished board of directors to serve the corporation. In the course of his direction of the company, decedent obtained a large number of German patents that subsequently were extremely beneficial to the United States in its conduct of World War II; erected modern plants; reorganized the various divisions of the company and was largely instrumental in putting all of them on a profitable basis. His services merited and received the entire satisfaction of his Swiss principal, defendant Interhandel.

9. Sometime prior to October, 1941, a small group of the minority American stockholders of GAF, or, at least, a minority of General Aniline and Film Corporation's board of directors who also may have been stockholders, at the instigation of certain United States government officials attempted to gain control of the corporation. At first they attempted to persuade decedent, through one, William Breed, a member of the board of directors, to sell the company to financial interests friendly to them. Although William Breed and other members of this minority had been elected directors of GAF by defendant Interhandel, and although there was by this time only one German national owning stock in GAF, which stock represented but a very minor interest in the company, Breed asserted that the best interests of the corporation required that there be no basis for anyone to suspect that any German nationals held any interest in, or controlled, GAF. This argument was a device used by said minority group to seek control of GAF for its own ends. Because decedent's brother was a German national

and Chairman of the Financial Board of I.G. Farben Industrie, the largest German chemical and industrial firm, the aforementioned minority directors suggested that decedent resign, and that the company be sold to American investors of their choice. Aware that such concessions would defeat the interest of his Swiss prinicpal, defendant Interhandel, decedent refused all such suggestions. These members of the board, representing less than two or three per cent of the voting stock of the corporation, then obtained an opinion of counsel that under certain Presidential Proclamations of Emergency, foreign owners of stock were not entitled to vote their stock. On the basis thereof, and contrary to the express desires of the owners of 93% of the stock, decedent was voted out as president of General Aniline and Film Corporation. In order to vindicate himself as the chosen instrument of his Swiss principal and in order to reestablish rightful control by these owners, decedent instituted in the courts of the State of Delaware, where the company was incorporated, a suit on behalf of the Swiss owners and the majority of the American stockholders, to invalidate the action of the representatives of the small minority of American stockholders.

10. Before the suit mentioned in the preceding paragraph could be tried, the United States entered the War and the Secretary of the Treasury. Henry Morgenthau, Jr., seized all of Interhandel's shares of stock in General Aniline and Film Corporation as the property of an allegedly enemy-controlled corporation, by virtue of a Vesting Order dated February 16, 1942. The government of the United States, exercising the same control formerly exercised by Interhandel, put in a new president and a board of directors of its own choosing.

11. Officials of the United States apparently were convinced that GAF actually was owned by German interests and that the ownership of the stock by defendant Interhandel was simply a device to conceal the true ownership. These officials thought that the true owners of Interhandel stock were not Swiss but German nationals. If such a theory

could be established, the United States Government would be justified in taking and indeed would be required to take title to the stock of General Aniline and Film Corporation owned by defendant Interhandel, whereas, if defendant Interhandel were really Swiss owned, the United States would ultimately be required to return GAF to its Swiss owners. At stake, accordingly, was a multimillion dollar industrial empire which the United States government was determined by any legal method, however stringent, to establish as enemy-controlled.

12. The government had no proof of its theories, but it did have various plausible suspicions. The most obvious way to prove its theory was through decedent, Dietrich A. Schmitz. He had set up the company, had continuous dealings with the Swiss owners, and was a brother of the afore-mentioned Hermann Schmitz. If any available witness knew the facts, it was decedent, and if anyone so authoritative could once be persuaded to admit a German tie-up, the government's success would be certain.

13. Accordingly, all conceivable means of persuasion and coercion available in the government's arsenal of extraordinary wartime powers was brought to bear on this key witness. Decedent's personal assets were blocked in their entirety as if he were an enemy national, whereas he had, as it has been stated, been a United States citizen since before the First World War. None of his own money could be spent without permission nor any assets transferred. His past tax returns, although previously examined and approved, were reopened, and resort was had to every variety of interrogation and inquiry. He was interviewed by innumerable government investigators, both in his home and upon summons to New York and Washington. He was called before a grand jury and questioned over a period of many days. He was indicted, together with GAF, for three separate alleged anti-trust violations, but was told by federal prosecutors that they would recommend a suspended sentence if he would plead nolo contendere while admitting German ownership of General Aniline and Film Corporation. Defend-

ant appeared before various Congressional Committees which were inquiring into the same question. In every inquiry or prosecution he was completely vindicated and no statement ever was elicited from him that could be interpreted as aiding the government's theories.

14. The sole purpose of all of these government instituted procedures was to prove one central allegation - that General Aniline and Film Corporation was owned or ultimately controlled by the enemy. This persecution continued over many years and required decedent to spend large sums of his own funds for legal fees. His time was entirely taken up in these defenses. His health was seriously impaired and on at least one occasion he collapsed under the strain of prolonged interrogation. He could seek no other occupation. He had to expend his principal to maintain himself and his family. Yet his occupation with these matters was by no means personal for the government was not concerned with punishing or prosecuting him. Decedent could readily have avoided all such endless vexation, harassment and expenses and loss of health, by making the one, single, simple admission that the government sought. But his devotion to truth and his faithfulness and loyalty to his principal, defendant Interhandel, prevented this. Decedent suffered incalculable personal pain, hardship, suffering, loss and deprivation in the uninterrupted service of defendant Interhandel.

15. Throughout the entire period from 1941 until his death in December, 1962, decedent was encouraged in his resistance to the government's claim by loyality to his Swiss principal. He was in the closest possible touch, as far as the exigencies of the War permitted, with Dr. Hans Sturzenegger, a director and, until 1953, the largest single stockholder of defendant Interhandel; Dr. Felix Iselin, President of defendant Interhandel and a director of GAF; and Dr. Albert Gadow, general manager of defendant Interhandel. Decedent was authorized by them to institute the suit against the aforesaid usurping directors in 1941, and directed to exercise his powers and judgment to do all things necessary as defendant Interhandel's attorney-in-fact to pro-

tect its interests and see its rightful positions preserved. He was thereafter continuously encouraged by defendant Interhandel to resist the claims of the United States Government. As soon as he was able to go to Switzerland after the war, he reported fully to the officials of defendant Interhandel, including Dr. Hans Sturzenegger. Decedent's entire course was approved. He was repeatedly consulted by them concerning their attempts to recover their stock that had been vested by the United States government and made numerous trips to Switzerland for this purpose at his own expense.

16. As a result of decedent's almost single-handed effort, the United States government never was able to obtain proof that any German had any interest, direct or indirect, in General Aniline and Film Corporation which was significant in terms of the control of that company. Defendant Interhandel thus was enabled at the conclusion of the War to demand the return of its stock in GAF that had been vested by the United States. After various extensive negotiations and a determination by certain compensation commissions organized pursuant to the Washington Accord of 1945 that GAF was Swiss-owned and controlled, defendant Interhandel, in 1948, filed suit against the Attorney General of the United States in an action denominated Societe Internationale, etc. (Interhandel - I.G. Chemie), et al v. Kennedy, D.D.C. Civil No. 4360-48. Without attempting to recount the extremely complex yet essentially liminal history of that suit, it may be summarized by saying that the plaintiffs therein, unable to maintain a unified policy in regard to the management of their case, and the defendants, recognizing the difficulties of their defense, ultimately, after nearly 20 years, entered into a stipulation of settlement whereby the vested stock of defendant Interhandel was sold at a very large price and defendant Interhandel became entitled to $145,568,000.00 of the proceeds. After the offset of certain tax claims and other amounts, the balance available to defendant Interhandel consists of approximately $121,600,000.00. This sum has been segregated in a special account in the Treasury of the United States to the credit of the defendant Interhandel.

17. The estate of decedent has an equitable lien on this sum, created for or preserved to defendant Interhandel, by decedent's supreme, untiring and prolonged efforts, for the value of the services he performed, the expenditures he made and the losses in fortune and health he sustained on behalf of said defendant. As president of GAF, the decedent was an important figure in American industry and earned a salary, commensurate with his stature and responsibilities, in the neighborhood of $100,000.00 a year. In view of the satisfaction given his principal, this salary would have continued until his retirement and almost certainly would have been very substantially increased. Decedent would have been entitled to a proportionately large retirement pension. Stock options would have enabled him to increase his share in the company. In 1942, decedent had a fortune in excess of a million dollars. A substantial part of this fortune was invested in various blue-chip stocks and in real estate that would have greatly increased in value from 1942 to the time of his death. Decedent lost all salary subsequent to the time of his unlawful ouster in 1941 and virtually all of his pension rights. His time was so completely taken up in the defense of his Swiss principal, and he was under such a burden and cloud in maintaining its interest, that he was otherwise unemployable. He expended several hundred thousand dollars in legal fees and other expenses incident to the aforesaid government persecution, all of which directly benefited defendant Interhandel. He was unable to invest and reinvest his principal by reason of the aforementioned blocking order so that he was unable to take appropriate measures to protect his personal investments in a time of great flux and change. Decedent exhausted his capital maintaining himself and his family and traveling to Switzerland and elsewhere on behalf of his principal. He was required to borrow money to meet his living expenses and, at the time of his death, his estate was practically insolvent. All of his loss of earnings and dissipation of capital are directly the result of his successful effort to preserve and defend Interhandel's interest in GAF.

18. By accepting the benefits of decedent Dietrich A. Schmitz's efforts on its behalf and having become entitled to a large sum of money which it would not have obtained without the heroic and long sustained effort of decedent, defendant Interhandel is obligated to pay to the estate of Dietrich A. Schmitz adequate compensation for the services he performed in creating and preserving the fund now in the Treasury of the United States. It is also obligated to reimburse decedent's estate for the losses he sustained while acting on defendant Interhandel's behalf.

19. To allow defendant Interhandel to retain all of the fruits of decedent's efforts on its behalf, which efforts enriched said defendant and impoverished decedent, would constitute unjust enrichment of defendant Interhandel at the expense of decedent and his estate.

20. Defendant Interhandel, through Dr. Sturzenegger, and later through Dr. Alfred Schaefer, recognized that it was indebted to decedent for his efforts and expenditures on its behalf and promised to make him whole and to compensate him for his efforts on behalf of defendant Interhandel from whatever funds were ultimately recovered from the United States government.

21. The value of the services performed for Interhandel by decedent Dietrich A. Schmitz amount to $7,500,000.00 and the losses sustained by decedent in his defense of Interhandel's interest amount to $2,500,000.00. Accordingly, defendant Interhandel is indebted to the estate of Dietrich A. Schmitz in the amount of $10,000,000.00, and plaintiffs, as executors of decedent's estate, have a lien on the aforementioned fund in the United States Treasury for that amount.

WHEREFORE, the premises considered, plaintiffs demand:

1. That a rule to show cause be issued against defendant Secretary of the Treasury, to show cause why he should not be enjoined from disbursing any portion of the fund derived from the sale to the public of the stock of General Anliline and Film Corporation that had been seized and vested by the United States government, which fund is now

held in the Treasury of the United States, unless and until provision is made for satisfying plaintiffs' claims, and upon return of the rule to show cause, that the defendant Secretary of the Treasury be enjoined from making such disbursement.

2. That if necessary a receiver be appointed to receive and hold a sum of ten million dollars ($10,000,000.00) from said fund pending determination of plaintiffs' complaint for mandatory injunction against defendant Secretary of the Treasury.

3. That ten million dollars ($10,000,000.00) of said fund in the Treasury of the United States be declared to be a trust for the benefit of plaintiffs, as executors of the estate of Dietrich A. Schmitz, deceased, and the amount found due to them be ordered to be paid them, in that capacity.

4. That process issue against defendant Interhandel, by publication, if necessary, so that it be caused to appear and answer the exigencies of this complaint.

5. That judgment be entered against defendant Interhandel, in the amount of ten million dollars ($10,000,000.00) and the Secretary of the Treasury be directed to satisfy such judgment from the fund in the Treasury of the United States to the credit of Interhandel.

6. That the Court afford such other or further relief as the exigencies of the case may require.

Herman A. Schmitz

Robert A. Schmitz
Lloyd J. Vail

Executors of the Estate of
Dietrich A. Schmitz, deceased

O'DONOGHUE & O'DONOGHUE

By

Ross O'Donoghue
520 Union Trust Building
Washington, D. C. 20005
Attorneys for Plaintiffs

STATE OF)
COUNTY OF) ss.

I, Herman A. Schmitz, do depose and say that I have read the foregoing Complaint for Injunction, Money Judgment and Other Relief, subscribed by me, and know the contents thereof; that the matters and things stated therein of my own personal knowledge are true and those stated on information and belief, I believe to be true.

Herman A. Schmitz

Subscribed and sworn to before me this __ day of _____, 1965.

Notary Public

STATE OF CONNECTICUT)
COUNTY OF) ss.

I, Robert A. Schmitz, do depose and say that I have read the foregoing Complaint for Injunction, Money Judgment and Other Relief, subscribed by me, and know the contents thereof; that the matters and things stated therein of my own personal knowledge are true and those stated on information and belief I believe to be true.

Robert A. Schmitz

Subscribed and sworn to before me this ____ day of _____, 1965.

Notary Public

STATE OF CONNECTICUT)
COUNTY OF) ss.

I, Lloyd J. Vail, do depose and say that I have read the foregoing Complaint for Injunction, Money Judgment and Other Relief, subscribed

by me, and know its contents thereof; that the matters and things stated therein of my own personal knowledge are true and those stated on information and belief I believe to be true.

Lloyd J. Vail

Subscribed and sworn to before me this ___ day of _____, 1965.

Notary Public

[Filed August 27, 1965]

PRAECIPE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

the 27th day of August, 1965

Herman A. Schmitz
Robert A. Schmitz
Lloyd J. Vail

vs.

Societe Internationale Pour Participation
Industrielles et Commerciales, S.A., et al.

Civil Action No. 2091-65

The Clerk of said Court will please send by registered airmail the attached copy of the complaint in the above entitled case to the defendant, Societe Internationale Pour Participations Industrielles et Commerciales, S.A., a.k.a. Internationale Industrie und Handelsbeteiligungen, A.G. at the address indicated in the caption, and request a return

receipt thereof by airmail. This service is to be effected in accordance with the provisions of Fed. R. Civ. P. 4(i)(1)(D)

ROSS O'DONOGHUE
By GEORGE A. FISHER

520 Union Trust Building
Washington, D.C.

Attorney for Plaintiffs

[Filed August 27, 1965]

PRAECIPE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

the 27th day of August, 1965

Herman A. Schmitz, ET AL.

vs.

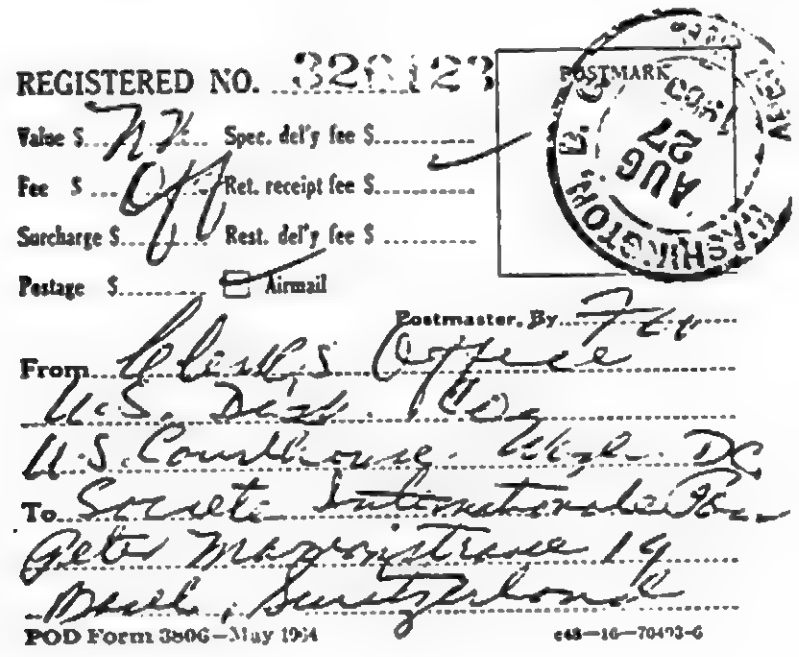
Societe Internationale Pour
Participations Industrielles, etc., Et Al.

Civil Action No. 2091-65

I hereby certify that I have this 27th day of August, 1965 by registered air mail, return receipt requested, sent to (foreign defendant) a copy of the summons and complaint.

HARRY M. HULL, Clerk

/s/ AMELIA G. SHANNON
Deputy Clerk


REGISTERED NO. 326123

Value $ N/A Spec. del'y fee $

Fee $ Ret. receipt fee $

Surcharge $ Rest. del'y fee $

Postage $ Airmail

POSTMARK AUG 27

Postmaster, By

From Clerk's Office
U.S. Dist. Ct.
U.S. Courthouse, Wash. DC

To Societe Internationale Pour
Getes Mayerstrasse 19
Basel, Switzerland

POD Form 3806—May 1954 648—16—70493-6

[Filed September 20, 1965]

MOTION OF DEFENDANT, SOCIETE INTERNATIONALE POUR DES PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A., TO DISMISS ACTION AND/OR TO QUASH RETURN OF SERVICE OF SUMMONS

Comes now the defendant, Societe Internationale Pour des Participations Industrielles et Commerciales, S.A. (Interhandel), by its attorneys, appearing specially, and moves this Court, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, to dismiss this action and/or to quash the return of summons purported to have been served upon it by mail received in Switzerland August 30, 1965, under Rule 4(i) of the Federal Rules of Civil Procedure, on the ground that such purported service is a nullity because it is predicated upon the assumed existence of a res in the District of Columbia and upon a claim to or lien upon such res on the part of the plaintiffs, none of which actually exists, as is shown by the affidavits of Dr. Alfred Schaefer, Dr. Hans Sturzenegger and John J. Wilson, hereto annexed and made a part hereof; and upon the further grounds that, in any event, substituted service

in this type of action is insufficient; and the Court lacks jurisdiction over the person of this defendant.

WHITEFORD, HART, CARMODY & WILSON

By /s/ John J. Wilson

Address: 815 - 15th Street, N. W.
Washington, D. C. 20005

Attorneys for defendant Societe Internationale Pour des Participations Industrielles et Commerciales, S.A. Appearing specially for the purpose of this motion, and for no other purpose.

I hereby certify that on the 16th day of September, 1965, copies of the foregoing Motion, annexed affidavits and supporting memorandum were mailed, postage prepaid, to Messrs. O'Donoghue & O'Donoghue, attorneys for the plaintiffs, Union Trust Building, Washington, D.C., and to the offices of the United States Attorney and the Attorney General in the District of Columbia, for the defendant Secretary of the Treasury.

/s/ John J. Wilson

[Filed September 20, 1965]

AFFIDAVIT OF DR. ALFRED SCHAEFER IN RELATION TO ANNEXED MOTION OF SOCIETE INTERNATIONALE TO DISMISS COMPLAINT AND TO QUASH SERVICE OF SUMMONS

Conferation of Switzerland)
Canton of Zurich) ss:
Consulate General of the United States)

I, Dr. Alfred Schaefer, being duly sworn on oath depose and state as follows:

That I am a director and Vice Chairman of the Board of Societe Internationale, etc. (called Interhandel), one of the defendants in the

above captioned case, and I have been such since June 1958, and I make this affidavit in support of Interhandel's Motion to Dismiss Complaint and to Quash Service of Process upon it in Switzerland by mail; that I have read the complaint filed in the above entitled cause and find my name mentioned in paragraph twenty (20) thereof; that I deny that Interhandel, through me, recognized that it was indebted to Mr. Dietrich A. Schmitz in any sum whatever for any alleged efforts and expenditures, and I further deny that Interhandel, through me, ever made any of the promises alleged in said paragraph; that I never met, talked to or communicated with or in any way had any contact, directly or indirectly, with Mr. Schmitz; and so far as I know Mr. Schmitz never requested any payment of any kind whatever from Interhandel for doing anything set forth in said complaint; and since I became connected with Interhandel Mr. Schmitz did not act, and was not authorized to act, in any capacity for Interhandel, and there did not come to my attention any alleged activities by Mr. Schmitz on behalf of Interhandel.

Dr. Alfred Schaefer

Subscribed and sworn to before me, this ___ day of September, 1965.

[Filed September 20, 1965]

AFFIDAVIT OF DR. HANS STURZENEGGER IN RELATION TO ANNEXED MOTION OF SOCIETE INTERNATIONALE TO DISMISS COMPLAINT AND TO QUASH SERVICE OF SUMMONS

I, Dr. Hans Sturzenegger, being duly sworn on oath depose and state that I have read the complaint filed in the United States District Court at Washington under Civil Action No. 2091-65; that I was formerely a director of Societe Internationale called Interhandel, one of the defendants named in said civil action and am mentioned several

times in said complaint; that I was acquainted with plaintiffs' decedent Dietrich A. Schmitz during his lifetime; that soon after Mr. Schmitz ceased to be president of General Aniline & Film Corporation in 1941 he no longer represented the interests of Interhandel in the United States and thereafter Interhandel was represented by other, chiefly lawyers, the principal one being John J. Wilson of Washington; and affiant denies the averments of paragraph 20 of said complaint that through him Interhandel either recognized that it was indebted to Mr. Schmitz in any sum whatever or made any of the promises set forth therein; and affiant further states that so far as he knows Mr. Schmitz never requested any payment of any kind whatever from Interhandel for doing anything set forth in said complaint.

Dr. Hans Sturzenegger

Subscribed and sworn to before me this ____ day of September, 1965.

[Filed September 20, 1965]

AFFIDAVIT OF JOHN J. WILSON IN SUPPORT OF ANNEXED MOTION TO DISMISS AND/OR TO QUASH

DISTRICT OF COLUMBIA, ss:

I, John J. Wilson, do solemnly swear that I was attorney of record for the defendant herein, Societe Internationale Pour des Participations Industrielles et Commerciales, S.A. (called Interhandel), in Civil Action No. 4360-48, in which Interhandel was plaintiff and the Attorney General and Treasurer of the United States were defendants; that there is attached hereto and made a part hereof a true and exact copy of the Stipulation of Settlement entered into by the parties and filed in said Civil Action, the terms and conditions of which govern and control

funds and United States of America Treasury obligation, belonging to Interhandel, in the hands of the defendant Secretary of the Treasury; that the defendant Secretary is not a stakeholder of said funds and securities, as claimed by the plaintiff in his complaint, since, through the defendant Secretary in his official capacity, the United States Government holds them as collateral security for Interhandel's indemnity obligations under said Stipulation, subject entirely and only to the authority and direction of the Attorney General of the United States as to their disposition and disbursement. (See particularly Sections VIII and IX of the attached Stipulation.)

Further to show the absence of an equitable lien in favor of plaintiffs' decedent under their complaint, and thus to support the annexed motion to dismiss and/or to quash service of process, this affiant states as follows:

1. That he has been Interhandel's lawyer in the United States since before Pearl Harbor, all in relation to (1) the anticipated seizure of General Aniline & Film Corporation, most of whose stock Interhandel owned, by United States Government officials; (2) the vesting of such stock; (3) the filing of claims for its return; (4) the maintenance of litigation which followed; and (5) the settlement of the case; and during the entire period he maintained constant contact, in one form or another, with United States Government officials having to do at the time with the foregoing subject matters.

2. Affiant has read the complaint filed in this case and denies that the decedent, Mr. Dietrich A. Schmitz, performed services or exerted efforts in his lifetime in the creation and preservation of the fund referred to in paragraph 3 of the complaint; denies the averments of the last sentence in paragraph 17 of the complaint; and denies all averments of fact and conclusions of law contained in the 18th paragraph of the complaint.

3. Affiant first met the late Mr. Dietrich A. Schmitz after he ceased to be president of General Aniline & Film Corporation and be-

fore Pearl Harbor, and as the American attorney for Interhandel, affiant saw Mr. Schmitz on a number of occasions in the early part of the war years. Mr. Schmitz never told affiant that he was acting as the representative or attorney-in-fact of Interhandel, and to the best of affiant's knowledge and belief, he denies that Mr. Schmitz was so acting. After the United States entered the war in December, 1941, the Government issues a Proclaimed List of Foreign Nationals, known as the "Blacklist", and Interhandel's name was placed on that list. As the result, no one in the United States could lawfully act for Interhandel without a license from the Foreign Funds Control of the Treasury Department, and affiant promptly obtained such a license. The Department of Justice took the view that affiant must also register as an agent for Interhandel under the Foreign Agents Registration Act, and he so registered. Mr. Schmitz did not procure a license from Foreign Funds Control to represent Interhandel, nor did he register under the aforesaid Act; and affiant believes that because Mr. Schmitz was "blocked", he could not have procured a Treasury license nor registered under said Act, had he tried to do so. Even under his license, affiant could not communicate with Interhandel, or its directors, officers or employees, but was required to have a special license for that purpose. It was not until after May 26, 1948 that Interhandel was taken off the Blacklist; and affiant was then permitted to obtain a passport to go to Switzerland to confer with his client. Affiant went to Switzerland in September, 1946 and remained there for about three weeks, meeting and conferring with all the directors, officers and employees of Interhandel, as well as others. Thereafter, he was in the company of Interhandel's general manager, Mr. Walter Germann, frequently for over ten years, and affiant and Dr. Hans Sturzenegger were together almost daily for about six months during that time. Affiant was in the company of Dr. Felix Iselin, former president of Interhandel for substantial periods both in Switzerland and in the United States. Although affiant believes that he had the complete confidence of the Interhandel

people, and in numerous conferences reviewed with them personalities, facts, details, documents, etc., with relation to their case, on no occasion did anyone connected with Interhandel state or indicate to affiant that Mr. Schmitz was a representative of Interhandel in the United States after he ceased to be president of General Aniline & Film Corporation.

/s/ John J. Wilson

Subscribed and sworn to before me this ___ day of September, 1965.

Notary Public, D.C.

[Filed September 27, 1965]

RETURN ON SERVICE OF WRIT

United States of America,)
District of Columbia) ss: CA 2091-65

I hereby certify and return that I served the annexed Summons & Complaint on the therein-named Societe Internationale Pour Participations Industrielles et Commerciales, S.A. or Internationale Industrie und Handelsbeteiligungen, A.G., by handing to and leaving a true and correct copy thereof with

are not to be found in my district

in the said District on the 17th day of September, 1965.

LUKE C. MOORE
United States Marshal

Marshal's fees: $3.00

/s/ JEANETTA ANDERSON
Deputy

[Filed October 15, 1965]

MOTION OF DEFENDANT, THE HONORABLE HENRY H. FOWLER, SECRETARY OF THE TREASURY, TO DISMISS COMPLAINT

Comes now defendant, the Honorable Henry H. Fowler, Secretary of the Treasury, by the undersigned attorneys and moves the Court to dismiss the complaint herein for lack of jurisdiction and for failure to state a claim upon which relief may be granted for the following reasons:

1. This suit is an unconsented suit against the United States:

2. The plaintiffs have failed to join the Attorney General of the United States, who is an indispensable party;

3. The plaintiffs are attempting to obtain judicial relief with respect to discretionary duties of an executive officer of the United States in violation of the separation of powers doctrine which relegates such duties exclusively to the Executive Branch of Government;

All as more fully set forth in the memorandum of defendant's points and authorities filed in support hereof.

Respectfully submitted,

Carl Eardley
Acting Assistant Attorney General
Civil Division, Department of Justice

John C. Conliff, Jr.
United States Attorney

Dated:_____

Harland F. Leathers
Attorney

Robert J. Wieferich
Attorney

Attorneys, Department of Justice

[Filed Jan. 19, 1966]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT A. SCHMITZ,
Plaintiff

v.

SOCIETE INTERNATIONALE, etc.,

and

HENRY H. FOWLER,
Secretary of the Treasury,
Defendants

and

HERMAN A. SCHMITZ,
ROBERT A. SCHMITZ,

and

LLOYD J. VAIL,
Executors of the Estate of
Dietrich A. Schmitz, deceased,
Plaintiffs

v.

SOCIETE INTERNATIONALE, etc.,

and

HENRY H. FOWLER,
Secretary of the Treasury,
Defendants

Civil Action No. 1900-65

Civil Action No. 2091-65

MEMORANDUM OPINION

Ross O'Donoghue, Esq., for Plaintiffs

John J. Wilson, Esq., for Defendant Societe Internationale, etc.,

Robert J. Wieferich, Esq., Department of Justice, for Defendant Fowler

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These two cases were consolidated for hearing on the motions respectively filed in each. The first mentioned case is brought by Robert A. Schmitz against Societe Internationale, etc., known and referred to herein as Interhandel, and the Secretary of the Treasury. The second mentioned case is brought by the Executors of the Estate of Dietrich A. Schmitz, deceased, against Interhandel and the Secretary of the Treasury.

Before me are motions in each case, filed, respectively, by Interhandel and the Secretary of the Treasury, hereinafter referred to as Secretary.

These cases are the outgrowth of protracted litigation before this Court, the United States Court of Appeals for the District of Columbia Circuit, and the Supreme Court of the United States. It was finally brought to a conclusion in 1964 by the entry of a Stipulation of Settlement hereinafter referred to. The litigation involved the claim of Interhandel against the Alien Property Custodian to assets of Interhandel including more than 90 percent of the capital stock of General Aniline and Film Corporation, hereinafter referred to as GAF. These assets were vested in the Alien Property Custodian under the Trading With The Enemy Act, [1/] under a claim that Interhandel was controlled by officers and stockholders who were engaged in a conspiracy with the German Government and German Nationals to conduct the business of GAF in their interest during the war with Germany. Interhandle brought an action in this Court, which became the subject of the protracted litigation above referred to, contending that the assets of Interhandel had been illegally seized and that the assets were not enemy tainted.

This is only a brief description of this litigation, but is sufficient for the purposes of the motions I am called upon to decide.

In the case filed by Robert A. Schmitz, individually, defendant Interhandel has filed a motion to dismiss and/or to quash the return of

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1/ 50 U.S.C. App. 5(b)

summons, and defendant Fowler, the Secretary, has filed a motion to dismiss for lack of jurisdiction and for failure to state a claim upon which relief may be granted.

In the case filed by the Executors of the Estate of Dietrich A. Schmitz, deceased, defendant Interhandel and defendant Fowler, the Secretary, have filed motions identical to those filed by them in the other suit.

The first mentioned case, brought by Robert A. Schmitz, individually, asserts in brief the following: In December 1958, while plaintiff was in Switzerland, carrying on negotiations between Interhandel and certain prospective purchasers of Interhandel's interest in GAF, he was told by Dr. Sturzenegger, the principal stockholder of Interhandel, that Interhandel had decided not to sell its interest in GAF until it had brought to a conclusion its claim against the United States Government for the return of the property, and would negotiate with the United States Government to this end through an agent of its own choosing. Plaintiff's cooperation was solicited by Interhandel and he suggested the name of Charles E. Wilson, hereinafter referred to as Mr. Wilson, as Interhandel's representative for this purpose. Plaintiff reported to Interhandel after conferences with Mr. Wilson that the latter could be persuaded to act only if he were offered full powers as trustee to negotiate a settlement of the dispute upon such terms and conditions as would appear honorable and just to him. Plaintiff's suggestion was accepted, and he was asked to attempt to bring about the trusteeship of Mr. Wilson. Dr. Sturzenegger agreed that Interhandel would pay plaintiff a fee for bringing about the Wilson trusteeship and suggested that 2% or 3% would be more acceptable to Interhandel's stockholders than 5% as suggested by plaintiff. Plaintiff did not consent and no agreement was reached regarding the amount or percentage to be paid to plaintiff, but the clear understanding was that such fee should not be less than 2% or 3% of the total sum obtained. Plaintiff then proceeded with his efforts to bring about the trusteeship of Mr. Wilson, and in

1960 Mr. Wilson accepted the trust powers, which he held until 1962. Prior to his acceptance of the trust powers it was necessary for the plaintiff to accomplish many tasks including convincing Mr. Wilson that he should accept. On or about October 26, 1959, Dr. Schaefer, the chief executive and chairman of the executive committee of Interhandel, agreed that Interhandel would pay plaintiff for his services 5% of any money which Interhandel might receive in settlement of its dispute with the United States Government, payment to be made when the settlement funds due Interhandel became available; and largely as a result of plaintiff's efforts the image of Interhandel was changed in United States Government circles and the most influential Government officials were persuaded that justice demanded the recognition of Interhandel's claim.

In 1964 a Stipulation of Settlement was entered into between Interhandel and the then Attorney General Robert F. Kennedy, in which they agreed that the GAF stock involved herein should be sold, and the sums to which under the Stipulation of Settlement Interhandel should be entitled should be deposited in an account to be maintained by the United States Treasury to be designated as Interhandel Corporation of Switzerland, payable only on the order of the Attorney General according to the provisions of the Stipulation. The stock was sold, and pursuant to the Stipulation proceeds of the sale, amounting to approximately $121,000,000.00 were deposited in the Treasury of the United States, of which according to the statement of counsel for defendant Secretary at oral argument, are now of a value of approximately $61,-000,000.00. Plaintiff claims that he has an equitable lien on this fund to the extent of 5% of the amount recovered by Interhandel, namely, $145,000,000.00, or $7,250,000.00.

The second count is based on an alleged agreement between plaintiff and Interhandel that plaintiff would be compensated for the work performed by him and described in the first count. He alleges that no final agreement was reached regarding the amount or rate of his com-

pensation, and claims that it had a reasonable value of $150,000.00, which after deducting $38,000.00 already paid him on account makes the amount due and owing him $112,000.00.

Accordingly, plaintiff prays for an injunction against the Secretary from making disbursements of any part of this fund until provision is made for satisfying plaintiff's claims; that if necessary a Receiver be appointed to receive and hold $7,362,000.00 from the fund pending determination of plaintiff's complaint for a mandatory injunction against defendant Secretary, that $7,362,000.00 of this fund be declared to be a trust for the benefit of plaintiff and the amount found to be due him ordered paid him, and that judgment be entered against defendant Interhandel in the amount of $7,250,000.00, plus interest, and in the further amount of $112,000.00, plus interest.

Interhandel is a corporation organized and existing under the laws of Switzerland, having its principal place of business in Basel, Switzerland. There has been no attempt to serve process on Interhandel in this jurisdiction, but instead service by registered airmail has been attempted under Rule 4, Fed. R. Civ. P. 2/

2/ The pertinent sections of this Rule are as follows:

"(e) . . . SERVICE UPON PARTY NOT INHABITANT OF OR FOUND WITHIN STATE. Whenever a statute of the United States or an order of court thereunder provides for service of a summons . . . upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule . . .

"(i) ALTERNATIVE PROVISIONS FOR SERVICE IN A FOREIGN COUNTRY.

(1) Manner. When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in

[Continued, next page]

Plaintiff asserts jurisdiction of this case by reason of the provisions of § 11-521 and § 13-336, District of Columbia Code, (Supp. IV, 1965), [3] the general equity powers of the court in rem over a fund within the District of Columbia, and personal jurisdiction over defend-

[Fn. 2, continued]

which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: . . . (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served . . ."

[3] "Sec. 11-521, CIVIL AND CRIMINAL JURISDICTION.

(a) . . . the United States District Court for the District of Columbia, in addition to its jurisdiction as a United States district court and to any other jurisdiction conferred by law, has all the jurisdiction possessed and exercised by it on January 1, 1964, and has original jurisdiction of all:

(1) civil actions between parties, where either or both of them are resident or found within the District; and . . .

(b) Except as otherwise specially provided, an action may not be brought in the District Court by original process against a person who is not resident or found within the District."

"Sec. 13-336. SERVICE BY PUBLICATION ON NONRESIDENTS, ABSENT DEFENDANTS, AND UNKNOWN HEIRS OR DEVISEES.

(a) In actions specified by subsection (b) of this section, publication may be substituted for personal service of process upon a defendant who cannot be found and who is shown by affidavit to be a nonresident . . . .

(b) This section applies only to:

* * *

(6) actions for the enforcement of mechanics' liens, and other liens against real or personal property within the District; and

[Continued, next page]

ant Secretary of the Treasury to control the exercise of his ministerial duty. There being no personal service on Interhandel relief cannot be obtained against it unless this action falls within the ambit of §§ 11-521 and 13-336, D.C. Code, supra, and the general equity powers of the court in rem over a fund within the District.

Interhandel in its motion contends that the purported service is a nullity because it is predicated upon the assumed existence of a res in the District of Columbia, and upon a claim to or lien upon such res on the part of the plaintiff none of which actually exists.

Defendant Secretary contends as a basis for his motion to dismiss, that this suit is an unconsented suit against the United States, that plaintiff has failed to join the Attorney General who is an indispensable party, that plaintiff is attempting to obtain judicial relief with respect to discretionary duties of an executive officer of the United States.

As I see it, there is a res, in a general sense, within the District of Columbia, namely, a portion of the proceeds of the sale of the GAF stock, under the Stipulation of Settlement which proceeds have been deposited in an account maintained by the United States Treasury. But the question is whether it is a res which can be reached by plaintiff for the purpose of maintaining his suit against Interhandel and for the payment of his alleged claim. Under the Stipulation of Settlement, 4/ a portion 5/ of the proceeds of this sale of the GAF stock

[Fn. 3, continued]

(7) actions that have for their immediate object the enforcement or establishment of any lawful right, claim, or demand to or against any real or personal property within the jurisdiction of the court."

4/ Made a part of the Motions herein filed in this Court and filed in 1964 in C.A. 4360-48, of which this Court takes judicial notice.

5/ Approximately one-half after substantial deductions.

(which I shall hereinafter refer to for convenience as the "fund"), was deposited in the United States Treasury solely and entirely on the basis of the Stipulation of Settlement. The Stipulation provided that the fund ' shall be held by the United States as security for the faithful performance by Interhandel of the indemnity obligations imposed upon it" by the Stipulation, and that "redemptions" of this fund "for Interhandel shall be made from time to time, as determined by the Attorney General, to the extent that the Attorney General determines" that it is "no longer needed to secure the faithful performance by Interhandel of the indemnity obligations imposed upon it," and provided generally that Interhandel shall indemnify and hold harmless the United States, the Attorney General and all other officers, agents and employees of the United States from any and all claims, actions and liabilities which might arise under certain provisions of the Stipulation, particularly claims of the Government of the Netherlands, relating to the shares sold and claims arising out of the operations of GAF while under its government control over a period in excess of 20 years and ending as a result of the filing of the Stipulation of Settlement. The Stipulation further provided that this fund shall be payable only on order of the Attorney General according to its provisions, and that defendant Secretary shall be entitled to rely on any order for payment by the Attorney General as being in accordance with the provisions of the Stipulation. It will thus be seen that the fund, in whole or in part, can only be disbursed by the defendant Secretary upon the order of the Attorney General, and that it is being held as an indemnity to satisfy the claims referred to in the Stipulation. There is no presently outstanding order by the Attorney General releasing the fund, and neither it, nor any part thereof, can be acquired by Interhandel until released by him.

Over the years there have been a number of actions of a similar character which have been filed in this court seeking to impress an equitable lien on a fund in the United States Treasury. Several have been taken to the Court of Appeals, and two to the Supreme Court.

Among these cases are Houston v. Ormes, 252 U.S. 469; Mellon v. Orinoco Iron Company, 266 U.S. 121; Doerschuck v. Mellon, 60 App. D.C. 383; and McCormack v. Harrah, 60 App. D.C. 260. It would needlessly burden this Opinion to discuss these cases separately, because the principle of law announced therein is unvarying and identical, and it is this: In order to impress an equitable lien upon a fund in the United States Treasury, it is necessary that there exist several elements, namely, the Treasury officials must be charged with the performance of no duty other than the ministerial duty of making disbursement of the fund. It must be such a duty as could be compelled by mandamus, or a receivership. The United States must not be in the position of a debtor or creditor, but the fund must be an especially earmarked account to which the Treasury officials are under no other responsibility than that of the ordinary stakeholder, and the United States must have no claim or interest in the fund.

Applying these principles to the instant case, there would seem to be no doubt that these necessary elements are lacking. Here the United States has a direct and real interest, namely, the retention of the fund to indemnify it and certain federal officials from liability arising out of the sale of GAF stock. Here the defendant Secretary has no right to make any disposition of the fund except upon the order of the Attorney General. Here the Attorney General is not a party to the suit, and if he were, clearly his duties in connection with the fund are not ministerial but involve discretion. Here neither the United States nor defendant Secretary is a mere stakeholder, but he is holding the funds for the benefit of the United States. Here the action is clearly one against the United States which has not consented to be sued.

The action, therefore, cannot be maintained because it fails to state a claim upon which relief may be granted, does not present the requisite facts for the establishment of an equitable lien and therefore does not provide the basis for substituted service of process as attempted.

Apparently realizing the unsupportable position in which he is placed under the law announced in the authorities above mentioned, plaintiff has filed a memorandum in which he states he is willing to postpone receipt of the moneys to which he is entitled until the Government is satisfied that such money can be disbursed without injury to its security interest in the fund. This proposed modification of plaintiff's suit would not alter its inherent character. It would still be one against the United States which has not consented to be sued, and is an attempt to assert a lien on, and thereby permit the court to acquire jurisdiction over, a fund, when, as and if it reaches a posture which might make it subject to a lien. I know of no juridical basis for such an action, but to support his position for a "postponed" lien which in effect, as stated, is the assertion of a cause of action which does not now exist, but which may exist at some future time, he has referred to two sections of the United States Code, namely, 40 U.S.C. §§ 308,309, and 28 U.S.C. § 2410. On its face, 40 U.S.C. § 308 does not furnish the requisite consent. It provides that "nothing herein contained shall, however, be considered as recognizing or conceding any right to enforce by seizure, arrest, attachment, or any judicial process, any claim against any property . . . held . . . by the United States, or by any department thereof . . . or as waiving any objection to any proceeding instituted to enforce any such claim." Section 309 is based upon § 308 and, consequently, likewise does not furnish consent. This statute also involves the exercise of discretion by the Secretary of the Treasury.

Nor does 28 U.S.C. § 2410 supply consent. Subsection (a) which contains the pertinent provisions of § 2410 does not authorize a suit against the United States unless there are jurisdictional grounds independent of the statute. Remis v. United States, 273 F.2d 293 (1st Cir. 1960). Furthermore, the section is limited in purpose and application to situations involving the quieting of title or foreclosing of mortgages or other liens on real or personal property and clearing

real estate titles of questionable or valueless Government liens. See Quinn v. Hook, 231 F. Supp. 718 (E.D.Pa. 1964), aff'd, 341 F.2d 920 (1965). See also, United States v. Brosnan, 363 U.S. 237 (1960).

In view of the foregoing, it is unnecessary to reach the point raised by Interhandel that because of the denial of the contractual claims of plaintiff by sworn affidavits it is necessary, before a lien can attach, first to hold a hearing to determine the factual basis of their claim on which jurisdiction is predicated, under the authority of KVOS v. Associated Press, 299 U.S. 269; McNutt v. General Motors Acceptance Corporation, 298 U.S. 178; and Chase v. Wexler, 225 U.S. 79.

In the second suit brought by the executors of the estate of Dietrich A. Schmitz, deceased, against the defendants, plaintiffs, briefly stated, set forth that the deceased in 1930 was asked by Interhandel to represent it in all of its business interests in the United States, and was authorized by it to invest very substantial sums of money in various American corporations; that in 1929 he bought stock in the American I. G. Chemical Corporation, which later was merged with Agfa Asco Corporation and became GAF; that he performed numerous services for Interhandel to protect its interests after the vesting of the GAF stock, and that by his devotion to truth and faithfulness and loyalty to Interhandel he prevented the Government from obtaining evidence which would have defeated its claim for the return of the stock of GAF. They also allege that the deceased expended several hundreds of thousands of dollars in this connection, all inuring to the benefit of Interhandel, and that Interhandel promised to make him whole and to compensate him for his efforts on its behalf from whatever funds were ultimately recovered from the United States Government. They allege that the value of his services is $7,500,000.00, and that his losses amount to $2,500,000.00, and accordingly they claim that Interhandel is indebted to the estate in the amount of $10,000.000.00. They have prayers similar to those in the preceding case brought by Robert A. Schmitz, who is also one of the executors of this estate.

For the reasons hereinabove set forth in the suit brought by Robert A. Schmitz, individually, the same decision must be reached in this suit by the Executors of the Estate of Dietrich A. Schmitz, deceased.

Counsel will, therefore, present on notice orders in both cases dismissing the actions without prejudice to plaintiffs, if they are so advised, to present their claims in a new action if and when defendant Secretary has funds in his possession solely for distribution after release thereof by the Attorney General.

/s/ D. Pine
Judge

Dated: January 19, 1966

[Filed January 25, 1966]

Civil Action No. 1900-65

ORDER DISMISSING ACTION

This cause having come on for hearing on the motion of defendant Interhandel to dismiss and/or to quash the return of summons and the motion of defendant, Henry H. Fowler, the Secretary of the Treasury, to dismiss for lack of jurisdiction and for failure to state a claim upon which relief may be granted and the Court having considered the pleadings, memoranda, affidavits and arguments of the parties, and it appearing to the Court, as more fully set forth in the Memorandum Opinion herein, dated January 19, 1966, that the complaint should be dismissed, it is by the Court this 25th day of January, 1966,

ORDERED, that the complaint be and it hereby is dismissed without prejudice to plaintiff presenting his claim in a new action if and when defendant Secretary has funds in his possession solely for distribution after release thereof by the Attorney General.

/s/ David A. Pine
Judge

No objections as to form:

Ross O'Donoghue
Attorney for Plaintiff

Robert J. Wieferich
Attorney for defendant,
Henry H. Fowler

Civil Action No. 2091-65

[Filed January 25, 1966]

ORDER DISMISSING ACTION

This cause having come on for hearing on the motion of defendant Interhandel to dismiss and/or to quash the return of summons and the motion of defendant, Henry H. Fowler, the Secretary of the Treasury, to dismiss for lack of jurisdiction and for failure to state a claim upon which relief may be granted, and the Court having considered the pleadings, memoranda, affidavits and arguments of the parties, and it appearing to the Court, as more fully set forth in the Memorandum Opinion herein, dated January 19, 1966, that the complaint should be dismissed, it is by the Court this 25th day of January, 1966.

ORDERED, that the complaint be and it hereby is dismissed without prejudice to plaintiffs presenting their claim in a new action if and when defendant Secretary has funds in his possession solely for distribution after rlease thereof by the Attorney General.

No objections as to form:

Ross O'Donoghue
Attorney for Plaintiffs

Robert J. Wieferich
Attorney for Defendant
Henry H. Fowler

/s/ David A. Pine
Judge

[Filed January 25, 1966] Civil Action No. 1900-65

NOTICE OF APPEAL

Notice is hereby given this 25th day of January, 1966, that plaintiff Robert A. Schmitz hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 25th day of January, 1966 in favor of defendants against said plaintiff.

/s/ Ross O'Donoghue
Attorney for Plaintiff

Copies to be sent to:

John J. Wilson, Esq., 815 - 15th Street, N.W., Washington, D. C. 20005, attorney for defendant Societe Internationale Pour Participations Industrielles Et Commerciales, S.A.

Robert J. Wieferich, Attorney, Civil Division, U.S. Department of Justice, Washington, D.C., attorney for defendant Fowler.

[Filed January 25, 1966] Civil Action No. 2091-65

NOTICE OF APPEAL

Notice is hereby given this 25th day of January, 1966, that plaintiffs Herman A. Schmitz, et al, Executors of the Estate of Dietrich A. Schmitz, deceased, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 25th day of January, 1966 in favor of defendants against said plaintiffs.

Attorney for Plaintiffs
Union Trust Building,
Washington, D. C.

Copies to be sent to:

John J. Wilson, Esq., 815 - 15th Street, N.W., Washington, D.C. 20005, Attorney for defendant Societe Internationale Pour Participations Industrielles Et Commerciales, S.A.

Robert J. Wieferich, Attorney, Civil Division, U.S. Department of Justice, Washington, D.C., attorney for defendant Fowler.

IN THE

United States District Court

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4360-48

SOCIETE INTERNATIONALE, etc. (INTERHANDEL-I.G. CHEMIE), ET AL., *Plaintiffs,*

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, etc., et al., *Defendants.*

STIPULATION OF SETTLEMENT (DECEMEBER 20, 1963) AS AMENDED BY SUPPLEMENTARY AGREEMENT (MARCH 25, 1964)

This Stipulation of Settlement (hereinafter referred to as this "Stipulation") to be filed with the Court, made as of this 20th day of December, 1963, to compromise, settle and dispose of, as among the parties to this Stipulation, Civil Action No. 4360-48 in the United States District Court for the District of Columbia (hereinafter referred to as the "Action"), without prejudice to the rights of parties to the Action who do not consent to the settlement of the Action, witnesseth that the parties hereto do stipulate and agree as follows:

SECTION I: PARTIES TO THIS STIPULATION

The parties to this Stipulation are:

1. Societe Internationale Pour Participations Industrielles et Commerciales S. A. (also known as Internationale Industrie und Handelsbeteiligungen A. G., formerly named Internationale Gesellschaft fur Chemische Unternehmungen A. G. (I. G. Chemie), and Societe Internationale Pour Enterprises Chimiques S. A. (I. G. Chemie), and hereinafter referred to as "Interhandel"), a corporation, incorporated under the laws of Switzerland, whose office is at Basle, Switzerland; and

2. Robert F. Kennedy, as Attorney General of the United States of America (hereinafter referred to as the "Attorney General"), successor to the Alien Property Custodian (hereinafter referred to as the "Custodian"); and Kathryn O'Hay Granahan, as Treasurer of the United States of America (hereinafter referred to as the "Treasurer").

SECTION II: RECITALS

1. GAF Shares Claimed by Interhandel

Those shares of the common stock of the General Aniline & Film Corporation which were vested pursuant to the Trading with the Enemy Act and which are subject to the Action are described in Schedule A annexed to this Stipulation. Said corporation is hereinafter referred to as "GAF", and said shares (together with any shares issued in substitution of or in exchange for said shares pursuant to one plan of recapitalization described in Section IV of this Stipulation) are hereinafter referred to as "GAF Shares".

2. Vested Cash Claimed by Interhandel

The cash accounts which were vested pursuant to the Trading with the Enemy Act and which are subject to the Action are described in Schedule B annexed to this Stipulation.

3. Interhandel Shares

During 1944, 1945, and 1946, in lieu of cash dividends, GAF declared and distributed to the Custodian and the Attorney General, as dividends on the GAF shares held by the Custodian and the Attorney General, 28,238 half-paid shares and 55,610 fully-paid shares of the capital stock of Interhandel, and the Attorney General, as successor to the Custodian, now holds those shares (except for 822 half-paid shares presently in the custody of Interhandel). Of the above mentioned shares 822.76 half-paid shares and 1,627.89 fully-paid shares are held by the Attorney General and not claimed by Interhandel. The Attorney General has determined that it is in the public interest to sell to Interhandel, at private sale, upon the terms and conditions set forth in this Stipulation, all shares described in this paragraph 3.

4. Taxes

The cash dividends received by the Attorney General of the United States as successor to the Alien Property Custodian and his predecessors in office, on the GAF shares referred to in paragraph 1 of this Section II, and the cash sums received by the Attorney General, as described in paragraph 2 of this Section II, are on deposit in the United States Treasury in Account Symbol 15X-8404, Alien Property Fund, World War II. Out of said amount, United States taxes have been paid to December 31, 1950, upon those sums and upon the value of Interhandel shares described in paragraph 3 of this Section II, and the balance remaining on deposit in said account is the sum of $2,998,183.96. There remain to be paid from said account additional United States taxes on cash dividends received by the Attorney General subsequent to December 31, 1950.

5. Administrative Proceedings and Commencement of the Action

(a) On or about February 1, 1943, and also on or about June 2, 1948, Interhandel filed notices of claim for return of property with respect to the vested property referred to in paragraphs 1, 2, and 3 of this Section II.

(b) On October 21, 1948, Interhandel instituted the Action for the return of the property referred to in paragraphs 1, 2, and 3 of this Section II.

6. Counterclaims

On March 4, 1949, and December 21, 1949, the Attorney General filed counterclaims in the Action, seeking the recovery from Interhandel of:

(a) The sum of $9,498,220 for income taxes, penalties and interest allegedly due from Interhandel for the years 1929 through 1933.

(b) The sum of $67,128 with interest, for 411 fully-paid Interhandel shares allegedly converted by Interhandel in 1949.

(c) The sum of $265,574 with interest, for 1,626 fully-paid Interhandel shares allegedly made worthless by Interhandel's refusal to recognize the Attorney General as owner.

(d) The sum of $2,720,489 with interest, for 27,416 half-paid Interhandel shares allegedly made worthless by Interhandel's refusal to recognize the Attorney General as owner.

(e) The sum of $8,817,206 with interest, for 53,984 fully-paid Interhandel shares allegedly made worthless by Interhandel's refusal to recognize the Attorney General as owner.

7. Authority of Signatories

(a) The Attorney General is the officer of the United States of America authorized to settle and compromise the Action and, on behalf of the Defendants in the Action, enter into this Stipulation.

(b) At its general meeting of shareholders held on March 29, 1963, the shareholders of Interhandel approved in principle the settlement of the Action upon the principles set forth in this Stipulation. By resolution dated December 2, 1963 duly authorized, executed, authenticated and proved and filed with the Attorney General, Interhandel has authorized its undersigned attorney, John J. Wilson, in its behalf to settle and compromise the Action and to enter into this Stipulation.

8. Intervenors

In consideration of the settlement of the Action, certain Intervenors in the Action have agreed to dismiss with prejudice their complaints in intervention. These Intervenors (hereinafter referred to as "Consenting Intervenors") are listed in Schedule C annexed to this Stipulation, as said Schedule C may be amended. Certain other Intervenors in the Action, described in paragraph 2 of Section IV of this Stipulation, have not agreed to the settlement of the Action. Those Intervenors (hereinafter referred to as "Nonconsenting Intervenors") are listed in Schedule D annexed to this Stipulation, as said Schedule D may be amended pursuant to paragraph 1 of Section VII of this Stipulation.

9. GAF Shares Not Claimed by Interhandel

As a result of various vesting actions taken pursuant to the provisions of the Trading with the Enemy Act and executive orders and regulations thereunder, the Attorney General now holds 85,270 shares of the common A stock

of GAF which are not claimed by Interhandel and are not subject to the Action. References in this Stipulation to "GAF shares" shall not be deemed to include or refer to the GAF shares described in this paragraph 9.

SECTION III: MATTERS TO BE ACCOMPLISHED BEFORE SALE

1. At any time after February 10, 1964, upon 10 days written notice to Interhandel from the Attorney General, Interhandel shall:

(a) Deliver or cause to be delivered to the Attorney General the releases described in clauses (i) and (ii) of this subparagraph (a). The releases therein described shall be in favor of the United States, the Attorney General and all other officers, agents and employees of the United States, and shall release any claims to any of the money or property described in paragraphs 1, 2, and 3 of Section II of this Stipulation. Those releases are as follows:

(i) A release from the Confederation of Switzerland of any claim which it might be in a position to espouse on behalf of: (A) itself or any of its political subdivisions; or (B) any Swiss national person.

(ii) Releases from each of the following persons, or their successors in interest:

Osmon A. G. (Schaffhausen)
Anlage und Verwaltung, A. G., formerly named Industrie-Bank A. G. (Zurich)
N. V. Maat.Voor Ind. en Handelsbelangen
H. Sturzenegger, for himself, and for H. Sturzenegger & Cie., as successor to Ed. Greutert & Gie. (Basle), including without limitation, its interest in Grutchemie-Konsortium (Basle).

Union Bank of Switzerland.
Deutsche Laenderbank (Frankfurt).
Banque Federale.

(b) Obtain from the Government of the Netherlands and deliver to the Attorney General the release of any claim which the Government of the Netherlands might be in a position to espouse on behalf of (i) itself or any of its political subdivisions, (ii) Interhandel or persons, if any, who, at the time such claim arose or is asserted, controlled or control Interhandel, were or are controlled by Interhandel, or with Interhandel, were or are under common control, or (iii) any Dutch national person. Such release shall be in form satisfactory to the Attorney General, and shall be in favor of the United States, the Attorney General, and all other officers, agents and employees of the United States, and shall release all claims to any of the money or property described in paragraphs 1, 2, and 3 of Section II of this Stipulation. If, at the time specified in the first sentence of this paragraph 1, Interhandel shall be unable to deliver the release described in this subparagraph (b), then, until the Attorney General is satisfied that the Government of the Netherlands can or will maintain no such claim, Interhandel shall be bound to the indemnity set forth in paragraph 3 of Section IX of this Stipulation.

(c) Present evidence satisfactory to the Attorney General that it has delivered to GAF for cancellation all certificates representing GAF shares held by Interhandel or persons, if any, controlling Interhandel, controlled by Interhandel, or, with Interhandel, under common control, the shares covered thereby being ultimately embraced in Cert. #AO 4184 and Cert. #AO 4169, both dated May 5, 1948, issued in the name of the Attorney General.

(d) Present evidence satisfactory to the Attorney General that it has dismissed with prejudice the case

of *Societe Internationale* [etc] v. *Commissioner of Internal Revenue*, Docket No. 24177 in the Tax Court of the United States.

(e) Deliver to the Attorney General an instrument, in form satisfactory to the Attorney General, evidencing that it has appointed John J. Wilson as attorney-in-fact to accept service of process on its behalf for such proceedings between the parties to this Stipulation as may be necessary to the interpretation or enforcement, or both, of this Stipulation or any judgment concluding the Action between Interhandel and the Defendants, but for no other purpose and no other extent whatsoever.

2. Interhandel agrees:

(a) That in case of the death, incapacity, resignation, or removal by Interhandel of John J. Wilson, attorney-in-fact as aforesaid, or any successor, Interhandel shall within 30 days appoint as his successor a person selected by Interhandel; *Provided, however,* That Interhandel's attorney-in-fact shall always be a person regularly resident in the District of Columbia or a firm or corporation maintaining an office in the District of Columbia.

(b) That if for any reason Interhandel should fail to appoint a successor attorney-in-fact as so required, then, the Clerk of the United States District Court for the District of Columbia shall be deemed to be Interhandel's attorney-in-fact, and that service of process upon such Clerk, for the purposes stated in subparagraph 1(e) of this Section III, shall be valid service of process upon Interhandel; and

(c) That Interhandel shall maintain an attorney-in-fact as provided in subparagraph 1(e) of this Section III until one year shall have elapsed after the last pay-

ment pursuant to Section VIII of this Stipulation shall have been made to Interhandel.

3. As soon as practicable, the Attorney General shall appoint a Committee of Financial Advisors (hereinafter referred to as the "Committee"), one of whose members shall be suggested by Interhandel. In case of the death, incapacity or resignation of any member of the Committee, the Attorney General shall appoint a successor member; *Provided*, That if it becomes necessary to replace the member suggested by Interhandel, Interhandel will be invited to suggest a replacement. No member of the Committee is or shall be (a) an Intervenor, or (b) a person who is or has been a director, officer, agent, or directly or indirectly interested in the pecuniary profits or contracts of Interhandel or persons, if any, controlling Interhandel, controlled by Interhandel, or with Interhandel, under common control. The Committee will act by majority vote, and will advise the Attorney General with respect to the recapitalization of GAF and the sale of GAF shares as provided in Sections IV and V of this Stipulation. Reasonable fees and expenses of the Committee will be paid by the Attorney General and reimbursed as provided in paragraph 2(a) of Section VI of this Stipulation.

SECTION IV: RECAPITALIZATION

1. The Attorney General has determined that a recapitalization of GAF will facilitate the sale of GAF shares as provided for in Section V of this Stipulation, and shall, with the advice of the Committee, prepare a plan of recapitalization. Interhandel and the Attorney General agree to take such action in the United States District Court for the District of Columbia as may be necessary to enable the Attorney General to effect such recapitalization.

2. Upon the successful completion of such action as Interhandel and the Attorney General shall have taken

pursuant to paragraph 1 of this Section IV, the Attorney General shall cause a meeting of the shareholders of GAF to be held to consider and vote upon such plan. At least 30 days before such meeting, the Attorney General shall mail to each Nonconsenting Intervenor, at the address listed in Schedule D to this Stipulation (or at such other address of which the Attorney General may have received written notice) a copy of the plan, and a ballot by which each Nonconsenting Intervenor may signify his approval or disapproval of the plan. At such meeting, the Attorney General, in person or by proxy, shall vote against the adoption of the plan that number of GAF shares which is shown on Schedule D to this Stipulation to be subject to the claims of those Nonconsenting Intervenors who shall have advised him before such meeting that they disapprove of the plan; and he shall not vote at all that number of GAF shares which is shown on Schedule D to this Stipulation to be subject to the claims of those Nonconsenting Intervenors who shall have failed to advise him whether they approve or disapprove of the plan. The Attorney General shall, in person or by proxy, vote all other GAF shares in favor of the plan; *Provided*, That in the event that the Attorney General, with the advice of the Committee, should conclude, in his discretion, that because of changed circumstances carrying out the plan of recapitalization would not facilitate the sale of GAF shares as provided in Section V of this Stipulation, he may cause such plan of recapitalization to be abandoned. If such plan of recapitalization is adopted, the Attorney General shall authorize and instruct the appropriate officers of GAF to take all steps necessary for carrying out such plan of recapitalization.

SECTION V: SALE OF GAF SHARES

1.* After completion or abandonment of the recapitalization referred to in Section IV of this Stipulation, the Attorney General shall offer for sale, pursuant to the provisions of the Trading with the Enemy Act, as amended, and pursuant to the provisions of this Stipulation, all GAF shares except those which may be reserved in respect of Nonconsenting Intervenors.

2. The time, manner, terms and conditions of the offer for sale referred to in paragraph 1 of this Section V, the acceptance or rejection of any offer received, and the making of any sale of GAF shares, shall be determined by the Attorney General, with the advice of the Committee, in accordance with the Trading with the Enemy Act and regulations issued thereunder.

3. Interhandel consents to a sale of GAF shares pursuant to this Section V.

4.* The net proceeds of any sale (as defined in subparagraph 2(b) of Section VI of this Stipulation) provided for by this Section V shall be deposited in the United States Treasury in Account Symbol 15X-8404, Alien Property Fund, World War II, and shall be held in that account pending either the entry of a judgment in the Action upon the consent of Interhandel and the Attorney General or the filing by the parties to this Stipulation of a praecipe of dismissal of the Action with prejudice; thereupon the share of the proceeds to which Interhandel shall be entitled, pursuant to paragraph 4 of Section VI and paragraph 3 of Section VII of this Stipulation shall be held in accordance with the provisions of Section VIII of this Stipulation.

5. If the Attorney General sells the shares of GAF stock described in paragraph 9 of Section II of this Stipu-

* As amended by Supplementary Agreement (March 25, 1964).

lation at the same time as the sale of GAF shares held in accordance with this Section V, the proceeds from the sale of those shares described in paragraph 9 of Section II of this Stipulation shall not be deemed to be part of the proceeds subject to this Stipulation.

SECTION VI: DISPOSAL OF ASSETS

The proceeds of the sale described in Section V of this Stipulation and the money and other property described in paragraphs 2 and 3 of Section II of this Stipulation shall be divided between the United States and Interhandel as follows:

1.* Of the $2,998,183.86 now on deposit in the Treasury of the United States in Account Symbol 15X-8404, Alien Property Fund, World War II, the United States shall receive, and shall be the absolute owner of, $2,938,183.86; and the Attorney General shall place $60,000 in the fund of Reserved Property described in paragraph 1 of Section VII of this Stipulation.

2. Of the proceeds of the sale held pursuant to Section V of this Stipulation, the United States shall receive and shall be the absolute owner of the following sums and amounts:

(a) An amount equal to the total of (i) expenses incurred by the United States (including reasonable fees and expenses of the Committee) and by GAF (and reimbursed or to be reimbursed by the United States to GAF) in connection with the settlement, in connection with the recapitalization described in Section IV of this Stipulation, and in connection with the sale of GAF shares described in Section V of this Stipulation, and (ii) the compensation of the Special Master appointed by Order of this Court entered in this action on February 14, 1950, which compensation was fixed by agree-

* As amended by Supplementary Agreement (March 25, 1964).

ment between the parties and the Court on February 10, 1950, and is to be paid to the Special Master by the United States. If the Attorney General sells the shares of GAF stock described in paragraph 9 of Section II of this Stipulation at the same time as the sale of GAF shares held pursuant to Section V of this Stipulation, and if he should incur expenses which relate to the sales of both blocks of stock, he shall make an equitable allocation of such expenses against the respective proceeds of sale of each such block.

(b) 50% of the remaining proceeds from the sale of GAF shares held in accordance with Section V of this Stipulation after the sum described in subparagraph (a) of this paragraph 2 has been deducted (said remaining proceeds being hereinafter referred to as the "net proceeds").

(c) An additional sum of $23,900,000.

(d)* An additional sum equal to $60,000 plus 50% of the value of the reserved GAF shares described in Section VII of this Stipulation. For the purposes of this subparagraph (d), the value of reserved GAF shares shall be determined by multiplying the number of reserved GAF shares by the average gross price per share received by the Attorney General upon the sale held pursuant to Section V of this Stipulation.

3. Immediately after the sale held pursuant to Section V of this Stipulation, and in consideration of Interhandel's agreement to the division of the sales proceeds as set forth in this Section VI, the Attorney General shall sell and deliver to Interhandel, and Interhandel shall receive and shall be the absolute owner of the 28,238 half-paid and the 55,610 fully-paid Interhandel shares referred to in paragraph 3 of Section II of this Stipulation.

* As amended by Supplementary Agreement (March 25, 1964).

4. Subject to the provisions of Section VIII of this Stipulation, Interhandel shall be entitled to the following sums and amounts:

(a) The balance of the net proceeds remaining after the sums described in subparagraphs 2(b), 2(c), and 2(d) of this Section VI shall have been deducted; *Provided*, That such sum shall be held subject to the provisions of Sections VIII and IX of this Stipulation.

(b) In addition, the proceeds of any Reserved Property which, at the time described in paragraph 3 of Section VII of this Stipulation shall not have been awarded to Nonconsenting Intervenors; *Provided*, That any such property shall be held subject to the provisions of Sections VIII and IX of this Stipulation.

SECTION VII: PRESERVATION OF RIGHTS OF NONCONSENTING INTERVENORS

1.* The parties to this Stipulation have determined, in accordance with the method used by the Court in its findings of fact and conclusions of law filed in the Action on March 15, 1957, the maximum number of A and B GAF shares to which all Nonconsenting Intervenors might be entitled if they should prevail in their claims. Schedule D to this Stipulation lists, as to each Nonconsenting Intervenor, his name, his last known address, the number of Interhandel shares of which he claims to be owner, his proportionate interest in Interhandel, and the maximum number of A and B GAF shares to which he might be entitled if he should prevail in his claim. The Attorney General shall reserve from the sale to be held pursuant to Section V of this Stipulation the number of A and B GAF shares shown on said Schedule D, as it may be amended, and any GAF shares received by him in respect of such A and B GAF shares upon the carrying out of any plan of recapitalization. The Attorney General also shall deduct from the sum described in paragraph 1 of Section VI of

* As amended by Supplementary Agreement (March 25, 1964).

this Stipulation and shall reserve, subject to the Nonconsenting Intervenors' claims to a proportionate interest in the vested cash and in the increment upon A and B GAF shares, the sum of $60,000. The Attorney General shall not sell such reserved GAF shares pursuant to Section 9(a) of the Trading with the Enemy Act except after application therefor to and approval thereof by the United States District Court for the District of Columbia. The GAF shares described in this paragraph 1, any proceeds from any sale of such GAF shares, and the sum of $60,000 above described, are herein referred to as "Reserved Property." The Attorney General shall retain such Reserved Property until the rights of Nonconsenting Intervenors have been adjudicated or their claims finally dismissed.

2.* In the event that the amounts which the United States shall be required to pay on account of judgments in favor of Nonconsenting Intervenors shall be in excess of the amount of Reserved Property, then the United States shall pay such excess and shall be entitled to recover from Interhandel the amount of such excess. Any such recovery shall be effected in accordance with the provisions of Section IX of this Stipulation.

3.* Upon the entry of final judgment in favor of or against the last remaining Nonconsenting Intervenor in the Action, and the exhaustion of any right to seek judicial review thereof or the lapse of time in which such judical review may be sought, the amount of Reserved Property, if any, not awarded to the Nonconsenting Intervenors shall be ascertained by the Attorney General. All Reserved Property at that time consisting of GAF shares shall be sold by the Attorney General. The proceeds from such sale (or if such GAF shares shall theretofore have been sold, the proceeds from any such prior sale) plus so much of the sum of $60,000 described in paragraph 1 of this

* As amended by Supplementary Agreement (March 25, 1964).

Section VII as shall not have been awarded to the Nonconsenting Intervenors shall be deposited in the United States Treasury in Account Symbol 15X-8404, all expenses of any sale of Reserved Property promptly deducted and the balance shall thereupon be transferred to the account in the Treasury of the United States described in paragraph 1 of Section VIII of this Stipulation and shall be the property of Interhandel, subject to the provisions of subparagraph 4(b) of Section VI and Section IX of this Stipulation.

SECTION VIII: INVESTMENT OF PROCEEDS—INDEMNIFICATION FUND

1. The sums which Interhandel shall be entitled to and shall be the owner of pursuant to subparagraphs 4(a) and 4(b) of Section VI and paragraph 3 of Section VII of this Stipulation shall be deposited into an account to be maintained by the United States Treasury to be designated as Interhandel Corporation of Switzerland, payable only on the order of the Attorney General, according to the provisions of this Section VIII and Section IX of this Stipulation. The Secretary of the Treasury shall be entitled to rely on any order for payment by the Attorney General as being in accordance with any and all provisions of this Stipulation.

2. The Secretary of the Treasury will invest the dollar funds deposited in the account in special United States Treasury obligations. Such obligations will mature at the end of each calendar month. The Secretary of the Treasury will reinvest, on a monthly basis, the proceeds of matured securities including accrued interest. The Secretary of the Treasury, for the purpose of making payment directed by the Attorney General, will use the proceeds of the maturing special United States Treasury obligations, and may redeem the special issues before maturity for this purpose if necessary. Such securities shall be held in safekeeping

by the Secretary of the Treasury for Interhandel, subject to the order of the Attorney General and to the provisions of Section IX of this Stipulation.

3. Interest shall be due and payable at maturity or upon redemption before maturity on the special United States Treasury obligations at a rate equal to ¼ of 1 percent less than the market yield rate for Treasury securities of comparable maturities computed for the month next preceding the date of such issue. Applicable United States income taxes upon such interest shall be withheld at the time of payment.

4. The United States Government securities described in paragraph 2 of this Section VIII shall be held by the United States as security for the faithful performance by Interhandel of the indemnity obligations imposed upon it by Section IX of this Stipulation. Redemptions of such securities for Interhandel shall be made from time to time, as determined by the Attorney General, to the extent that the Attorney General determines that such securities are no longer needed to secure the faithful performance by Interhandel of the indemnity obligations imposed upon it by Section IX of this Stipulation.

SECTION IX: EXTINGUISHMENT OF CLAIMS AND INDEMNIFICATION

1. Interhandel hereby releases GAF, the United States, the Attorney General and all other officers, agents and employees of the United States from any claim which

(a) Interhandel,

(b) any holder of Interhandel shares (in such capacity)* except those referred to in Section VII of this Stipulation,

* Parenthesis closed by amendment in Supplementary Agreement (March 25, 1964).

(c) persons, if any, who, at the time such claim arose or is asserted, controlled or control Interhandel, were or are controlled by Interhandel, or, with Interhandel, were or are under common control, or

(d) any person asserting a claim through or on behalf of any claimant included within subparagraphs (a), (b), or (c) of this paragraph 1,

may have or may have had of any kind whatsoever in connection with or arising out of any action or omission of GAF, the United States, the Attorney General or any other officer, agent, or employee of the United States, at any time prior to the execution of this Stipulation, and thereafter if pursuant to the terms of this Stipulation, to the extent such action or omission relates to the operation or control of GAF, or to any of the actions described or referred to in paragraphs 1, 2, and 3 of Section II of this Stipulation.

2. Interhandel shall indemnify and hold harmless the United States, the Attorney General and all other officers, agents and employees of the United States from any and all claims, actions, or liabilities described in subparagraphs (a) and (b) of this paragraph 2:

(a) Any claim made or action filed relating to the property or the actions described in paragraphs 1, 2 and 3 of Section II of this Stipulation or resulting from the compliance by the United States, the Attorney General, or any other officer, agent or employee of the United States with the terms of this Stipulation; *Provided*, That except for any liability described in paragraph 2 of Section VII of this Stipulation, the claims of Nonconsenting Intervenors described in Section VII of this Stipulation shall not be included within the claims or actions referred to in this subparagraph (a).

(b) Any claim made or action filed relating to the control or operation of GAF, if any such claim or action is asserted by (i) Interhandel, (ii) any holder of Interhandel shares (in such capacity) other than a Nonconsenting Intervenor described in Section VII of this Stipulation, (iii) persons, if any, who, at the time such claim arose or such action is filed, controlled or control Interhandel, were or are controlled by Interhandel, or, with Interhandel, were or are under common control, (iv) any successor in interest to any persons described in clauses (i), (ii), or (iii) of this subparagraph (b), or (v) any person asserting a claim through, under, or on behalf of any of the foregoing.

3. Until the release described in subparagraph 1(b) of Section III of this Stipulation shall have been delivered to the Attorney General or the Attorney General is otherwise satisfied that the Government of the Netherlands can or will maintain no claim, Interhandel shall indemnify and hold the United States, the Attorney General and all other officers, agents and employees of the United States harmless from any claims or actions which may be brought against them by the Government of the Netherlands on behalf of

(a) itself or any of its political subdivisions,

(b) Interhandel or persons, if any, who, at the time such claim arose or such action is filed, controlled or control Interhandel, were or are controlled by Interhandel or, with Interhandel, were or are under common control, or

(c) any Dutch national person,

in respect of the money or property described in paragraphs 1, 2, and 3 of Section II of this Stipulation. The obligation, if any, imposed upon Interhandel by this paragraph 3 shall be governed by and subject to the provisions of paragraphs

4 and 5 of this Section IX, and shall be terminated upon the delivery by Interhandel of the release described in paragraph 3 of Section III of this Stipulation, or upon written indication from the Attorney General that he is otherwise satisfied that the Government of the Netherlands can or will maintain no such claim.

4. The Attorney General shall promptly notify Interhandel of any claim or action to which the indemnities described in paragraphs 2 or 3 of this Section IX may apply. Interhandel shall assume, upon delegation by the Attorney General, the defense of all claims of Nonconsenting Intervenors and the United States shall not settle or compromise any claim of a Nonconsenting Intervenor without the written consent of Interhandel. With respect to any other claim or action to which the indemnities described in paragraphs 2 or 3 of this Section IX may apply, if the face amount of the special United States Treasury obligations in the account described in paragraph 1 of Section VIII of this Stipulation, together with accrued interest thereon, is equal to or greater than the amount of any such claim or action, or if Interhandel shall otherwise give security in an amount satisfactory to the Attorney General, Interhandel shall have the right, if it so elects, and upon delegation by the Attorney General, to assume the defense of such claim or action. Interhandel and the Attorney General shall consult with each other with respect to the defense of any action assumed by Interhandel under this paragraph 4. The indemnity obligations set forth in paragraphs 2 and 3 of this Section IX shall not apply to any claim or action which is compromised or settled by the United States, the Attorney General, or any other officer, agent or employee of the United States, unless Interhandel shall have given its written consent to the terms of such compromise or settlement.

5. The United States shall recover any sums to which it may be entitled by reason of the indemnities provided for in this Section IX either (a) by payment from Interhandel to the United States Treasury, or (b) by cancellation of

an appropriate number of the special United States Treasury obligations described in Section VIII of this Stipulation.

SECTION X: STOCK AND CASH DIVIDENDS

1. If either GAF or Interhandel should, with respect to any share described in paragraphs 1 or 3 of Section II of this Stipulation, issue any stock dividend or divide any outstanding share, all of such dividend shares or divided shares shall be held subject to the provisions of this Stipulation which are applicable to such share or as part of the Reserved Property, as the case may be. If either GAF or Interhandel should combine any such outstanding shares into a lesser number of shares, such lesser number of shares shall likewise be held subject to the provisions of this Stipulation which are applicable to such share or as part of the Reserved Property, as the case may be. In any of such events, all references in this Stipulation to specific numbers of such shares shall be increased or decreased correspondingly, as the case may be.

2. Any dividends in cash paid on Reserved Property shall be deemed to be a part of the Reserved Property.

SECTION XI: RIGHTS CONCLUDED AND RESERVATIONS

1. With respect to the property and money referred to in paragraphs 1, 2, and 3 of Section II of this Stipulation, and, with respect to the counterclaims referred to in paragraph 6* thereof, this Stipulation determines and concludes the rights and claims of Interhandel and the Defendants. This Stipulation does not determine or conclude the rights and claims of the Nonconsenting Intervenors. Nothing contained in this Stipulation shall determine or conclude any rights or obligations of any parties plaintiff, as among each other, under the laws of the Confederation of Switzerland. This Stipulation shall not constitute a waiver by the

* Figure 5 changed to 6 by Supplementary Agreement (March 25, 1964).

United States (except for the claims for taxes asserted in the counterclaim described in paragraph 6(a)* of Section II of this Stipulation), or an admission of liability by any other party to the Action, in respect of any claim for United States corporation, income and excess profits taxes and United States individual income taxes, including accrued and unpaid interest thereon, with respect to (a) the ownership of the stock or property which is the subject of the Action and this Stipulation, (b) all dividends, distributions, or other payments obtained as a result of or in connection with the ownership of such stock or other property, (c) any distribution or payment made under the terms of this Stipulation, and (d) any distribution or payment ultimately received by any Nonconsenting Intervenor.

2. Interhandel agrees to waive any rights it may have to the refund of (a) income taxes which are the subject of the counterclaim described in subparagraph 5(a)** of Section II of this Stipulation, (b) all taxes paid and to be paid by the Custodian and his successor, the Attorney General, by reason of dividends received from GAF, and (c) taxes collected from dividends previously deposited in blocked accounts which were vested in the Custodian.

3. Upon delivery by the Attorney General to Interhandel of the 55,610 fully-paid shares and 28,238 half-paid shares referred to in paragraph 3 of Section VI of this Stipulation, Interhandel shall, for a period of not less than 180 days after the date of such delivery, make the offers described in subparagraphs (a) and (b) of this paragraph 3 to GAF, and to the other present legal owners of all the 460 bearer fully-paid and 257 bearer half-paid Interhandel shares which were declared and distributed by GAF as dividends in the years 1944, 1945, and 1946, and accepted by shareholders of GAF; *Provided,* That nothing contained in this paragraph 3 shall constitute a recognition by Inter-

* Figure 5(a) changed to 6(a) by Supplementary Agreement (March 25, 1964).

** This figure should be read as 6(a), as it was changed to read in the other instance above.

handel that such holders of bearer shares are lawful shareholders of Interhandel before they shall have been registered as such.

(a) Upon delivery to it by GAF of

(i) the 230 fully-paid and 118 half-paid bearer Interhandel shares owned by GAF,

(ii) a release by GAF of Interhandel from any claim for refusal or failure to register or convert such shares,

(iii) a duly executed unconditional and irrevocable consent to and ratification of this Stipulation without reservation of any right whatsoever, and

(iv) 250 Swiss francs for each of the 118 half-paid bearer shares described in this subparagraph (a),

Interhandel will exchange such 230 fully-paid bearer shares for 230 registered fully-paid shares and will exchange such 118 half-paid shares for 118 fully-paid registered shares.

(b) Upon delivery to it by any of the respective legal owners (other than GAF) of

(i) all the bearer fully-paid and half-paid Interhandel shares described in this paragraph 3 and held by such legal owner,

(ii) a written representation by such legal owner that the tendered shares are all that the holder owns,

(iii) releases in form and substance satisfactory to both the Attorney General and Interhandel releasing the United States, the Attorney General and all other officers, agents and employees of the United States, Interhandel and its officers, agents and employees, and GAF and its officers, agents and em-

ployees from any claim, demand or cause of action which the holder of such shares may have or may have had with respect to or arising out of the ownership of such shares or their distribution as GAF dividends, and representations in connection therewith, the failure or refusal of Interhandel to recognize such holder as the lawful holder of such shares or to register or convert such shares, and any other act or omission regarding such shares,

(iv) a duly executed unconditional and irrevocable consent to and ratification of this Stipulation without reservation of any rights whatsoever,

(v) a stipulation of dismissal with prejudice of any complaint in intervention filed in respect of such shares,

(vi) 250 Swiss francs per half-paid bearer share tendered,

Interhandel will exchange all such fully-paid bearer shares for its registered fully-paid shares in the same respective amounts and will issue one fully-paid registered Interhandel share in exchange for each half-paid bearer share so tendered.

SECTION XII: COSTS

Interhandel and the Defendants in the Action each agree to bear all costs of the Action which it or they have incurred or paid, and to pay such further costs as it or they may incur in connection with any further proceedings necessary to complete the settlement of the Action.

SECTION XIII: PROCEEDINGS BEFORE THE DISTRICT COURT

In order to implement the provisions of this Stipulation, the parties to this Stipulation agree to take the following actions before the United States District Court for the District of Columbia.

1.* They shall move that the injunction entered in the Action on February 3, 1949, be amended by substituting for the phrase in paragraphs 1 and 2 thereof "until 90 days after the termination of the subject litigation" the phrase "until 10 days after either a judgment shall be entered in this action on the consent of the Attorney General and Interhandel or the filing by the parties to this Stipulation of a praecipe of dismissal with prejudice of the action".**

2. They shall jointly move the Court to dissolve the injunction entered in the Action on January 26, 1960.***

3. They shall take such action as may be necessary to request a determination of the Court that carrying out the terms of this Stipulation will not adversely affect the rights of Nonconsenting Intervenors to litigate their claims in intervention.***

4.* Interhandel shall submit satisfactory evidence, as required by Section 20 of the Trading with the Enemy Act, as amended, that the aggregate of all fees paid and to be paid to all agents, attorneys at law or in fact or representatives for services rendered or to be rendered to Interhandel and to the Consenting Interventors, in connection with any payment made or judgment entered pursuant to this Stipulation, does not exceed the limitation imposed by said Section.

* As amended by Supplementary Agreement (March 25, 1964).

** This amendment has been abandoned by the parties as unnecessary.

*** Judge Pine's order of April 15, 1964 dissolved the injunction referred to in paragraph 2, and made the requested determination referred to in paragraph 3.

5.* They shall, as soon as practicable after the sale described in Section V of this Stipulation shall have been consummated, determine the total amount of money to which Interhandel shall be entitled pursuant to paragraph 4 of said Section V, and shall prepare and present to the District Court a consent judgment, in substantially the form annexed as Schedule E to this Stipulation, giving judgment in favor of Interhandel in such sum; *Provided*, That payment by the United States of the amount of such judgment shall be made only in accordance with the provisions of paragraph 4 of Section VIII of this Stipulation; *Provided further*, That if such judgment not be entered, they shall promptly file a praecipe of dismisal of the Action with prejudice.

6.* Simultaneously with the entry of the consent judgment or the praecipe described in paragraph 5 of this Section XIII, the Attorney General shall cause the counterclaims described in paragraph 6 of Section II of the Stipulation to be dismissed with prejudice.

ENTERED INTO, in the City of Washington, District of Columbia, this 20th day of December, 1963.

/s/ ROBERT F. KENNEDY
ROBERT F. KENNEDY, acting on his own behalf as Attorney General of the United States of America, successor to the Alien Property Custodian, a defendant in the Action; and on behalf of Kathryn O'Hay Granahan, as Treasurer of the United States of America, also a defendant in the Action.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A. (Interhandel)

By /s/ JOHN J. WILSON
JOHN J. WILSON, its attorney of record in the Action, and its attorney in fact

* As amended by Supplementary Agreement (March 25, 1964).

BRIEF FOR APPELLANTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,995

ROBERT A. SCHMITZ,

Appellant,

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A. and HENRY H. FOWLER, Secretary of the Treasury of the United States of America,

Appellees.

No. 19,996

HERMAN A. SCHMITZ, ROBERT A. SCHMITZ and LLOYD J. VAIL, Executors of the Estate of Dietrich A. Schmitz, deceased,

Appellants,

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A. and HENRY H. FOWLER, Secretary of the Treasury of the United States of America,

Appellees.

APPEALS FROM FINAL ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

In the opinion of appellants, the principal questions presented by these appeals are as follows:

1. Whether property in the hands of a pledgee in which the pledgor possesses a general property right and which is recognized by all concerned as belonging to the pledgor is such a *res* as will support an equitable lien in favor of a creditor of the pledgor?

2. If the pledged property is such a *res*, whether the trial court can acquire jurisdiction over the pledgor where the pledgor is served in a foreign country with process in accordance with Fed. R. Civ. P. 4(i)(1)(D) which provides for service by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the trial court to the party to be served?

3. Whether the Secretary of the Treasury can properly plead sovereign immunity as a defense to a suit which seeks to impress an equitable lien upon pledged property maintained in the Treasury of the United States where title to the pledged property is in the name of the pledgor, the pledged property is in a segregated account bearing the pledgor's name, and it is earmarked for payment to the pledgor?

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APPEALS FROM FINAL ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

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JURISDICTIONAL STATEMENT

These appeals are taken from orders of the United States District Court for the District of Columbia dismissing the complaints to impress equitable liens and for other relief filed by appellants in District Court Civil Action Nos. 1900-65 and 2091-65, respectively, without leave to amend. This Court has jurisdiction to hear and determine these appeals by virtue of the provisions of 28 U.S.C. § 1291. By order of this Court, dated March 11, 1966, these appeals were consolidated for all purposes.

STATEMENT OF THE CASES

The complaints filed by the appellants in their respective civil actions alleged the existence of equitable liens in their favor in a fund in the Treasury of the United States of America belonging to appellee Societe Internationale pour Participations Industrielles et Commerciales, S.A. (hereinafter sometimes referred to as "Interhandel") and segregated in a special account maintained in its sole name. (JA 3, 23) This fund represents the proceeds accruing to appellee Interhandel from the sale of its stock in General Aniline and Film Corporation (hereinafter sometimes referred to as "GAF") pursuant to the stipulation of settlement filed in *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Kennedy*, D.D.C. Civ. No. 4360-48. (JA 4-5, 23) In that suit appellee Interhandel sought to obtain the return of its interest in GAF which had been seized by the United States during World War II as alleged enemy-owned property. Named as defendants in each of the present civil actions were Interhandel and the Secretary of the Treasury. The corporate defendant was served in each instance by mail pursuant to the provisions of Rule 4(i)(1)(D), Fed. R. Civ. P. (JA 13-14, 34-36) Personal service was effected upon the Secretary of the Treasury.

Both complaints proceeded on concurrent theories for the establish-

ment of equitable liens, namely by virtue of express contracts and to avoid the unjust enrichment of appellee corporation. The allegations of the respective complaints will be discussed in detail, *infra*, consequently only a brief sketch of the factual background of the claims will be attempted here.

The complaint of Robert A. Schmitz, appellant in No. 19,995, recites that he was employed by Interhandel to take all necessary steps to persuade Charles E. Wilson, former high government official and President of General Electric Company, to act as trustee for it in negotiating with the United States government for the settlement of Interhandel's long-pending suit against the Attorney General. (JA 7) Under the terms of this agreement, it was expressly understood that appellant would be compensated for his services out of any proceeds which might be received as a result of such a settlement. (JA 7, 9) The complaint further recites that appellant expended a great deal of time, effort and skill in bringing about the trusteeship (JA 7-8); that during the period from June 1, 1960 to December 31, 1961, appellant rendered various expert services to the trustee (JA 10-11); and that during its existence the trusteeship contributed materially to the eventual settlement of Civil Action No. 4360-48. (JA 9-10) Count One of the complaint seeks the recovery of five per cent (5%) of the monies received by appellee corporation from the sale of its GAF stock as appellant's stipulated compensation for establishing the "Wilson trusteeship". (JA 10) The second count proceeds on a quantum meruit basis for the reasonable value of the work performed by the said Robert A. Schmitz in furtherance of the trusteeship's objectives subsequent to its creation. (JA 10-11) Although no agreement was reached as to the rate or amount of compensation that appellant was to receive for his continuing services to the Trustee and to Interhandel, it was understood that appellant would be compensated for this work. (JA 11)

Dietrich A. Schmitz, whose executors are the appellants in No. 19,-996, was President and Chairman of the Board of Directors of General Aniline and Film Corporation from the date that company was formed until shortly before its seizure by the United States government in early 1942. (JA 24-26) During that period of time, decedent held appellee corporation's proxies for all of its GAF stock which, of course, enabled him to elect GAF's entire board of directors and to direct its operations. (JA 24) In the language of the complaint, "decedent became and continued to be the sole trustee and attorney-in-fact for defendant Interhandel, with complete responsibility for fostering and protecting its interests in GAF, as well as the principal executive officer of GAF." (JA 24-25)

In the latter months of 1941, aided by an opinion of counsel that under certain Presidential Proclamations of Emergency foreign owners of stock in American companies were not entitled to vote their shares, decedent was voted out as the chief executive officer of GAF. (JA 26) Pursuant to express authority which he received from Interhandel (JA 26, 28), decedent challenged his ouster in the courts but, before the case could be reached for trial, GAF was seized. (JA 26) Thereafter, and in accordance with directives which decedent received from appellee corporation, he continued to take all steps possible to protect Interhandel's interest in GAF and to resist the government's claim that GAF was enemy-owned. (JA 28-29) Following the conclusion of World War II, decedent's entire course of action was approved and ratified by Interhandel (JA 29) and the latter, in recognition of the value of decedent's efforts on its behalf and his meritorious claim for the reasonable value of these services, promised to compensate him and make him whole from whatever funds ultimately were recovered from the United States government in connection with the resolution of the GAF seizure. (JA 31)

The complaints filed by appellants in District Court sought injunctions against the Secretary of the Treasury to enjoin him from disbursing any portion of the Interhandel fund unless and until provisions were

made for the satisfaction of their liens. (JA 11, 31-32) They also prayed that, if necessary, receivers be appointed to receive and hold portions of the fund equal to the amounts of their liens, i.e., $7,362,000.00 and $10,000,000.00, respectively, pending determination of their civil actions on the merits; that $17,362,000.00 of the fund be declared trusts for the benefit of appellants and the amounts found to be owing to them ordered paid; and that judgments be entered against Interhandel in the full amounts of the liens, plus interest. (JA 11-12, 32) In lieu of filing formal answers to these complaints, appellees each filed motions to dismiss which were granted by the District Court. (JA 55, 56) The order of dismissal provided that the court's action was taken without prejudice to the filing of new claims when "defendant Secretary has funds in his possession solely for distribution after release thereof by the Attorney General." (JA 55, 56)

Timely notices of appeal from these orders were filed on January 25, 1966. (JA 57)

STATUTES AND RULE INVOLVED

40 U.S.C. § 308

§308. *Releasing property from attachment*

Whenever any property owned or held by the United States, or in which the United States has or claims an interest, shall, in any judicial proceeding under the laws of any State, district, or territory, be seized, arrested, attached, or held for the security or satisfaction of any claim made against such property, the Attorney General, in his discretion, may direct the United States Attorney for the district in which the property is located, to cause a stipulation to be entered into for the discharge of such property from such seizure, arrest, attachment, or proceedings, to

the effect that upon such discharge, the person asserting the claim against such property shall become entitled to all the benefits of this section and section 309 of this title. Nothing herein contained shall, however, be considered as recognizing or conceding any right to enforce by seizure, arrest, attachment, or any judicial process, any claim against any property of the United States, or against any property held, owned, or employed by the United States, or by any department thereof, for any public use, or as waiving any objection to any proceeding instituted to enforce any such claim.

40 U.S.C. § 309

§309. *Payment*

In all cases where a stipulation is entered into under section 308 of this title, and, in consequence thereof, the property is discharged, and final judgment is afterward given in the court of last resort to which the Attorney General may deem proper to cause such proceedings to be carried, affirming the claim for the security or satisfaction of which such proceedings have been instituted, and the right of the person asserting the same to enforce it against such property by means of such proceedings, notwithstanding the claims of the United States thereto, such final judgment shall be deemed, to all intents and purposes, a full and final determination of the rights of such person, and shall entitle such person, as against the United States, to such rights as he would have had in case possession of such property had not been changed. Whenever such claim is for the payment of money, and the same is by such judgment found to be due, the presentation of a duly authenticated copy of the record of such judgment and proceedings shall be sufficient evidence to the proper accounting officers for the allowance thereof; and the same shall thereupon be allowed and paid out of any moneys in the Treasury not otherwise appropriated.

> The amount so to be allowed and paid shall not, however, exceed the value of the interest of the United States in the property in question.

Fed. R. Civ. P. 4 (i) provides in pertinent part:

> (i) *Alternative Provisions for Service in a Foreign Country.*
>
> (1) Manner. When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: . . . . or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; . . . .
>
> (2) Return. Proof of service may be made as prescribed by subdivision (g) of this rule, or by the law of the foreign country, or by order of the court. When service is made pursuant to subparagraph (1) (D) of this subdivision, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

STATEMENT OF POINTS

1. The order dismissing appellants' complaints to impress equitable liens and for other relief was improper because the fund maintained in the Treasury of the United States is a segregated account in the name of appellee Interhandel, a Swiss corporation, was and is a *res* upon which appellants can now impress their equitable liens.

2. Since there was and is in the District of Columbia a *res* upon which appellants can impress their equitable liens, service of process upon appellee Interhandel in Switzerland pursuant to Fed. R. Civ. P. 4 (i)(1)(D) was valid and effective to make it a party to the instant proceedings.

3. Appellants' complaints to impress equitable liens and for other relief do not constitute unconsented suits against the United States since the claims are against the fund and appellee Interhandel's interest therein. Appellants seek only to compel the Secretary of the Treasury to pay out the proceeds of the Interhandel fund to the persons entitled to receive it. Their suits do not adversely affect the government's indemnification rights and they do not attempt to control any discretionary activity of any government officer.

4. The Attorney General of the United States is not an indispensable party since his order releasing the fund to Interhandel is not a condition precedent to the impressing of appellants' liens.

5. By urging that appellants' suits are premature, appellees seek to deny appellants their day in court since appellants have no way of knowing when the fund is to be disbursed formally to appellee Societe Internationale, and said appellee is under no obligation to receive or to retain the proceeds of the fund in this country.

SUMMARY OF THE ARGUMENT

The allegations of appellants' complaints set forth dual, concurrent bases on which to predicate their equitable liens upon the Interhandel fund. Their liens arose both by virtue of express executory contracts with appellee corporation which afforded them rights in the fund itself, and by reason of the substantial contributions which they made to the creation of the fund with the knowledge, consent and encouragement of said company. Interhandel's general property right in the fund, as pledgor, is such a *res* as will presently support appellants' equitable liens and sustain substituted service of process upon Interhandel at its principal office in Switzerland under the provisions of Fed. R. Civ. P. 4(i)(1)(D). Accordingly, appellants' complaints did set forth claims upon which relief should be granted and appellants did obtain valid service of process upon appellee corporation. The District Court erred in failing to recognize this.

These suits are brought against the fund and Interhandel's property rights therein. The government's right to indemnification, if there should ever be a need for such, under its out-of-court agreement with appellee corporation will not be adversely affected by any judgments entered in favor of appellants. There are no known claims against the government requiring reference to the indemnification section of that agreement and, in any event, appellants' liens are secondary to the government's security interest in the fund. Moreover, there cannot possibly be any interference with the government's security rights for the further reason that, in order to do equity just as they seek it, appellants have offered, formally, to subordinate their liens to the government's security rights. Nor do appellants' suits seek in any way to control the discretion of any official of the United States government. The fund belongs to Interhandel and nothing needs to be done by anyone to establish its property rights. Appellee Secretary of the Treasury is under a duty to pay the proceeds of the fund to anyone entitled to receive it. Such an act, since ownership is not in issue, is a ministerial duty and can be directed by the Courts without the government's prior consent to suit. Therefore, the District Court erred in permitting the United States to invoke the doctrine of sovereign immunity.

The Attorney General is not an indispensable party to these suits inasmuch as appellants can be accorded full relief without his joinder. His authority under the stipulation to release the possession of the fund to Interhandel in no way affects that company's title to the fund.

The equities in this case weigh heavily in favor of appellants. If they are not permitted to maintain their suits at the present time, in all probability their liens will be lost forever. Appellants have no way of knowing when the fund is to be distributed to appellee corporation and, once it has been distributed, Interhandel is under no duty even to retain the proceeds in this country, let alone the District of Columbia. Appellants seek only an opportunity to present evidence in support of their

claims. Unless they are permitted to maintain the instant suits at this time, they may never have such an opportunity.

ARGUMENT

I

The Complaints Filed by Appellants in District Court Properly Alleged the Existence of Equitable Liens in Their Favor Upon the Interhandel Fund

A. Appellants' Liens Can Be Predicated Upon Both Express and Implied Contracts

1. There are alternate bases on which appellants can assert their respective equitable liens.

The allegations set forth in appellants' complaints, which appellees have admitted for purposes of their motions to dismiss,[1] place these suits in the classic pattern of equitable lien cases, typified by *Barnes v. Alexander*, 232 U.S. 117 (1913); *Orinoco Co. v. Orinoco Iron Co.*, 54 App. D.C. 218, 296 Fed. 965, *Appeal dismissed*, 265 U.S. 598 (1924), and *McCormack v. Harrah*, 60 App. D.C. 260, 51 F.2d 316 (1931), in which persons who had made significant contributions toward the creation of funds were accorded liens on the theory that they should be compensated for the valuable services they had rendered. Here, as in the *Barnes* and *McCormack* cases, by virtue of express agreements with appellee Interhandel, appellants have received an interest in, and consequently a charge upon, the fund in question as compensation for the services which they rendered to Interhandel. In addition, they performed valuable services

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[1] E.g., *Callaway v. Hamilton Nat'l Bank*, 90 U.S. App. D.C. 228, 195 F.2d 556 (1952). This is true regardless of the subsection of Rule 12(b), Fed. R. Civ. P. to which the motions may be addressed. Cf. *Lumbermans Mut. Cas. Co. v. Borden Co.*, 241 F. Supp. 683 (S.D. N.Y. 1965); *U.S. v. Anchor Line, Ltd.*, 232 F. Supp. 379 (S.D. N.Y. 1964).

which directly pertained to the creation of the fund itself, as in *Orinoco Co. v. Orinoco Iron Co.*, for which, in justice and equity, they ought to be compensated. Thus, with the exception of the lien asserted in Count Two of the complaint filed by appellant Robert A. Schmitz, which proceeds solely upon the latter theory, appellants have not one, but two concurrent bases on which to predicate their liens. See 4 Pomeroy, *Equity Jurisprudence*, §§ 1233-35, 1238-39 (5th ed. 1941); McClintock, *Equity*, § 118 (2nd ed. 1948).

2. Appellants are entitled by express contract with Interhandel to impress equitable liens on the fund since their agreements provided that they would be compensated for their services out of the fund.

The agreements which appellants entered into with appellee Interhandel with regard to compensation definitely contemplated that appellants would be paid out of the fund to be derived from the anticipated settlement of *Societe Internationale, etc. v. Kennedy, et al*, D.D.C. Civ. No. 4360-48, and that the fund itself would constitute the security for such payments. Before proceeding to an analysis of these contracts, reference to the description of the agreements in the respective complaints is appropriate.

No. 19,995. The agreement which underlies Count One of the complaint filed by appellant Robert A. Schmitz, individually, is set forth in paragraphs seven through eleven thereof (JA 6-9), and must be considered in the context of Interhandel's continuing efforts to liquidate its holdings in GAF as described in paragraph six and seven of the complaint (JA 5-6). After having acted on behalf of several American companies who were interested in acquiring Interhandel's interests in GAF, and after having been encouraged in his efforts by Interhandel, appellant was advised by the latter in December, 1958 that it had determined that it would discontinue further efforts to sell its GAF stock until it could

settle its long-pending action against the Attorney General. Interhandel proposed to negotiate with the United States government through an intermediary who was familiar with the decision-making processes of the executive branch and who had the stature to deal with high officials as a peer. Appellant's cooperation in obtaining the services of such a person was solicited. Appellant indicated his willingness to work with appellee corporation and suggested the possibility of obtaining the services of Charles E. Wilson, former President of General Electric Company who then was serving under presidential appointment as President of the People to People Foundation.

Recognizing that it would take a great deal of time, effort and ability to secure Mr. Wilson's consent to act on behalf of Interhandel, appellant and appellee corporation entered into an oral agreement whereby appellant would be compensated for his services on a contingent fee basis out of the proceeds of any settlement of the aforementioned Civil Action 4360-48 if he could bring about the proposed agency (JA 7). The fee percentage subsequently was agreed upon at 5% of the monies recovered (JA 9). Upon Mr. Wilson's acceptance of the trust powers on May 23, 1960, appellant had fully performed his obligations under the contract and thus became entitled to his compensation.

No. 19,996. Appellants' complaint describes in detail the services which the late Dietrich A. Schmitz rendered to appellee Interhandel over the space of many years upon its request and with its knowledge, consent and encouragement (JA 28-29). Decedent's resistance to, first, the takeover of GAF by its tiny minority of American stockholders and, second, its seizure by the United States government as allegedly enemy-owned property, and the importance of these efforts to appellee corporation, will be more fully considered in the next succeeding subsection of this Argument. Suffice it to state at this point that Interhandel's appreciation of these services and its recognition of decedent's meritorious claim for the reasonable value of these services, prompted it, after the

termination of World War II, to supplement this implied contract to compensate decedent by expressly affording him a security interest in whatever funds ultimately were recovered from the United States government in settlement of the GAF controversy. (JA 31)

The allegations of these complaints make it clear that both prior to, and at, the time when the agreements were reached, confidential relationships existed between the parties thereto and they were acting in pursuit of common interests. Compare *Smith v. Harrah,* 60 App. D.C. 258, 51 F.2d 314 (1931) (equitable lien denied), with *McCormack v. Harrah, supra* (equitable lien declared). Moreover, the agreements reveal a definite intention on the part of the contracting parties to afford appellants compensation out of the fund itself.

The significance of the fact that there was an understanding by all parties concerned that appellants should look to the fund recovered for satisfaction of their claims is pointed out in *Barnes v. Alexander, supra.* In that case there was an agreement that certain attorneys would receive for their services in connection with pending litigation a percentage of all that was received by their clients in settlement thereof. Declaring that the attorneys possessed an equitable lien upon the proceeds of settlement, the Supreme Court stated:

> ". . . Obviously the only thing intended or desired was to give the appellees a claim to one third of the fund received by Barnes if and when he should receive it. It is true that there was in a sense a *res* as to which present words of transfer might have been used. There was a right vested in Barnes, unless discharged, to try to earn a fee contingent upon success. But in a speculation of this sort the parties naturally turned their eyes toward the future and aimed at the fruits when they should be gained. . . . Barnes gave no general promise of reward; he did not even give a promise qualified and measured by success to pay anything out of his own property, referring to the fund simply

> as the means that would enable him to do it. . . . He promised only that if, when, and as soon as he should receive an identified fund, one third of it should go to the appellees. But he promised that. At the latest, the moment the fund was received the contract attached to it as if made at that moment."

232 U.S. at 121

The holding in *Barnes v. Alexander* was applied by this court in *McCormack v. Harrah, supra.* There, an engineer, acting pursuant to the terms of a contingent fee agreement, rendered what his bill of complaint characterized as material and expert assistance to the owner of a railroad in connection with the latter's claim against the Cuban government for indemnity for the destruction of the railroad. The engineer sought to impress an equitable lien upon a fund created by virtue of the settlement of the claim but the bill was dismissed by the District Court. In language especially pertinent to the claim of appellant Robert A. Schmitz, this Court set aside the order of dismissal and declared: "The allegations in plaintiff's amended bill that he was to be paid 10 per cent and that this 10 per cent was to be received by him from and out of the award, is we think sufficient to bring his claim within the doctrine of the cases cited . . . ." 60 App. D.C. at 261, 51 F.2d at 317. See also *DeWinter v. Thomas*, 34 App. D.C. 80, 84 (1909).

Equity regarding as done that which ought to be done, nothing further was required to be done by appellants to perfect their liens upon the fund in question once title to it vested in appellee Interhandel. "[T]he moment the fund was received the contract[s] attached to it as if made at that moment." *Barnes v. Alexander*, 232 U.S. at 121; see *Wardman v. Leopold*, 66 App. D.C. 111, 85 F.2d 277 (1936). It is clear, therefore, that appellants have security interests in the Interhandel fund by virtue of their express contracts which they are entitled to enforce in the instant proceedings.

3. Appellants also possess equitable liens upon the Interhandel fund by reason of the substantial contributions which they made to the creation of that fund.

In addition to the general rule that equitable liens may be created by executory contracts which, in express terms, stipulate that the property in equestion shall be charged as security for the promisor's debt or other obligation, there are some further instances where a court of equity will raise similar liens, without agreement therefor between the parties, based upon general considerations of right and justice. This latter class of equitable lien is illustrated by the holdings in *Orinoco Co. v. Orinoco Iron Co., supra,* and in *Sprague v. Ticonic Nat'l Bank,* 307 U.S. 161 (1939).

In *Orinoco Co.,* an iron company had developed a concession which the Venezuelan government had granted to the predecessors in interest of Orinoco Company, Limited. Just as the iron company was about to obtain a return on its investment, the mine property was seized by a revolutionary government which in the meantime had assumed power. Thereafter, a protocol was signed by the United States and Venezuela whereby the latter agreed to make reparation payments to the American government for the benefit of its citizens whose properties had been seized. When no provision was made for the iron company to share in the reparations fund the iron company asserted a lien against the fund in the Treasury which was earmarked for payment to the limited company. On such facts, it was declared that it would be unconscionable to permit the limited company to acquire title to property which in right and justice did not belong to it and, accordingly, the iron company was deemed to be entitled to impress an equitable lien upon the fund and to have execution. In *Sprague,* where petitioner's pilot case established a right of recovery for several other parties in situations comparable to her own, the Supreme Court declared that petitioner was entitled to re-

cover a share of her costs of conducting the litigation from those other parties. The Court said:

> "But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation - the absence of an avowed class suit or the creation of a fund, as it were, through *stare decisis* rather than through a decree - hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation."

The instant cases, of course, are stronger than either *Orinoco Co.* or *Sprague*. There, the persons whose efforts created the funds intended their work to benefit only themselves. They did not realize until after the funds had been established that their efforts benefitted others. Here, appellants' complaints make it clear that their services which brought about the creation of the Interhandel fund were rendered with the intention of conferring a benefit upon that corporation.

No. 19,995. Reference already has been made to the recitals of appellant's complaint with regard to the difficulty appellee corporation experienced in attempting to dispose of its interest in GAF while the latter company remained under seizure and to the establishment of the Wilson Trusteeship to carry on direct settlement negotiations with the United States government (*supra* at 10-11.)

Count one of appellant Robert A. Schmitz's complaint, in addition to alleging the existence of an express oral contract granting appellant an interest in the settlement proceeds, sets forth the nature of appellant's contribution to the creation of the fund by virtue of his time, effort and skill expended in the establishment of the Wilson trusteeship. The setting up of this trusteeship was an important step in bringing to an end the long pending suit by Interhandel against the Attorney General. This is brought out in paragraph 13 of Count one, wherein appellant asserts:

> "Following Mr. Wilson's acceptance of the trust powers, and with plaintiff's continuous active cooperation, he en-

> tered into intensive negotiations with the highest officials of the United States government in an effort to convince them of the merits of defendant Interhandel's claim and the unfairness and injustice of the government's resistance thereto. Largely as a result of these efforts the image of defendant Interhandel was changed in the United States government circles, the most influential government officials were persuaded that justice demanded the recognition of its claims, the prompt settlement of Interhandel's suit was greatly facilitated and the favorableness of the terms were greatly enhanced."
>
> JA 9-10

Count Two of the complaint details appellant's services to the trustee between June 1, 1960 and December 31, 1961, which enabled the trustee to render more effective service in his role as negotiator with the United States government. Appellant describes his efforts in paragraph 8 of this second count as follows:

> "Following Mr. Wilson's acceptance of the trust powers, and from June 1, 1960 through December 31, 1961, plaintiff performed, almost continuously, a great amount of work for defendant Interhandel. This work included assisting, advising, and providing factual material to the trustee and his counsel; liaison between them and the defendant Interhandel's management; reporting on and interpreting to the defendant Interhandel's management, the work of the trustee and American views, policies, circumstances, conditions and events; receiv[ing] interested Swiss visitors to the United States, including representatives of defendant Interhandel; and other tasks of importance on both sides of the Atlantic. This work commanded substantially all of plaintiff's time, thought, effort and attention, involved considerable travel, and required plaintiff to be available at all times. It precluded attention to other business matters. Plaintiff's capability to perform this work was unique.
>
> JA 10-11

Whether or not the claim set forth in Count Two is viewed as flowing directly from the claim stated in Count One is immaterial for purposes of this alternate theory of appellant's case. The one differentiating factor between the claims made in Count One and in Count Two is that appellant's services rendered prior to May 23, 1960 were rendered in accordance with his contract with Interhandel, whereas no formal agreement had been reached regarding the amount or rate of compensation for appellant's services subsequent to that date (JA 11). Of course, it was understood by the parties that appellant would be compensated by Interhandel for his continuing services to the trustee and to Interhandel subsequent to May 23, 1960 (Ibid.).

No. 19,996. The complaint filed by the executors of the estate of the late Dietrich A. Schmitz indicates the magnitude of the services which decedent rendered to appellee Interhandel. It also suggests, for it cannot hope to portray fully, the personal sacrifice and financial loss which decedent suffered in his defense of an extremely unpopular cause (JA 27-30). Decedent easily could have abandoned the interests of appellee corporation, but he did not. As the chosen instrumentality of Interhandel to manage the business and affairs of its subsidiary, General Aniline and Film Corporation (JA 24), the complaint makes it clear that decedent was responsible to Interhandel to preserve as best he could, the trust that had been placed in him (JA 28-29). With Interhandel's knowledge, consent and encouragement, decedent resisted all efforts to wrest control of GAF from appellee corporation - filing suit on its behalf where such was feasible and possible (JA 26); providing GAF's defenses to various criminal anti-trust indictments (JA 27); representing Interhandel's interests at Congressional hearings inquiring into the true ownership of GAF (JA 27-28); and generally doing whatever could be done to deny and disprove the allegations that GAF was actually owned by German interests (JA 29). The complaint then recites that:

> "As soon as he was able to go to Switzerland after the war, he reported fully to the officials of defendant In-

> terhandel, including Dr. Hans Sturzenegger. Decedent's entire course was approved. He was repeatedly consulted by them concerning their attempts to recover their stock that had been vested by the United States government and made numerous trips to Switzerland for this purpose at his own expense."
>
> JA 29

The inescapable conclusion to be drawn from a reading of this complaint is that were it not for decedent's almost single-handed effort, the fund which has been placed in the Treasury in Interhandel's name would never have come into existence. By preserving appellee corporation's interest in GAF, decedent did more than any other person to create the fund in which his estate now claims an equitable lien. Consequently, it would be most unjust to permit Interhandel to enjoy the fruits of decedent's labors without compensating his estate for their reasonable value.

B. The Interhandel Account in the United States Treasury Is Subject to Appellants' Equitable Liens at the Present Time

1. The fund is the property of Interhandel

In accordance with the stipulation of Settlement filed in *Societe Internationale, etc. v. Kennedy*, Interhandel's share of the proceeds of the sale of its stock in GAF is maintained by the Treasury in a segregated, special account bearing Interhandel's name. Stipulation, Section VIII, subsection 1 (JA 66) Indeed, counsel of record for appellee corporation, in affidavits which he filed in District Court in the instant proceedings, has admitted that the cash and securities in that account are his client's property. (JA 16, 40) Not only does the stipulation make reference to Interhandel as the "absolute owner" of its share of the proceeds, Stipulation, Section VI, subsection 3 (JA 65), and as being "entitled to" the proceeds, Ibid. at subsection 4, but it also provides for the payment of interest to Interhandel while its property remains in the Treasury, and

for the payment of income taxes upon such interest. Stipulation, Section VIII, subsection 3 (JA 67)

Interhandel seeks to postpone the impression of appellants' liens upon the fund by arguing that the fund is held by the government as collateral security for the faithful performance of appellee corporation's indemnification obligations under this stipulation. This delaying tactic must fail, however, because the fact remains that Interhandel - just as any other pledgor or mortgagor - has a general property interest in the fund upon which a lien may be impressed. *The Richmond v. Cake,* 1 App. D.C. 447, 461 (1893); cf. *Dollar v. Land,* 87 U.S. App. D.C. 214, 184 F.2d 245, *cert. denied,* 340 U.S. 884 (1950); *Pilger v. Sutherland,* 61 App. D.C. 84, 57 F.2d 604 (1932). In this respect, certain language used by this Court in *Dollar v. Land, supra,* has a particular significance. There, this Court declared:

> "Where the debt continues intact and the creditor releases a surety upon deposit of a paper security, the creditor does not by that transaction alone become absolute owner of the security thus deposited. He holds it as pledgee. Any other conclusion, if the transaction were between private parties, would be wholly untenable in our opinion. We do not see why the transaction should have a different essential nature merely because a Government agency was a party."
>
> 87 U.S. App. D.C. at 225,
> 184 F.2d at 256.

2. The government's interest in the fund does not insulate it from appellants' liens

The mere fact that the government may have a possessory interest in a particular fund does not preclude other creditors of the owner of that fund from asserting their liens against it. The most common illustration of this principle is the case in which the government files a tax lien

against a debt-ridden taxpayer whose property is subject to various other liens. Of course, the question of priorities in such an instance is controlled by statute, e.g. Internal Revenue Code, § 6323. The significance of such a situation to the present appeals, however, is that the mere existence of a lien in favor of the government - while perhaps relegating other liens to a subordinate position - does not *per se* vitiate those other liens. Nor does it prevent other creditors from thereafter asserting their liens against the fund. See *Stevan v. Union Trust Co.,* 115 U.S. App. D.C. 36, 316 F.2d 687 (1963); *United States v. Leventhal,* 114 U.S. App. D.C. 340, 316 F.2d 341 (1963).

That governmental and non-governmental interests in the same property can exist side by side is pointed up by the provisions of 40 U.S.C. §§ 308, 309 (1958 ed. as amended). Section 308 provides that whenever any property in which the United States may have any interest shall be attached as security for any claim made against the property, the Attorney General may cause a stipulation to be entered by the local U.S. Attorney in the district where the property has its situs for the discharge of such property from the attachment. The statute further provides that the consideration for such stipulation would be an agreement by the government that upon such discharge the person asserting the claim against the attached property shall become entitled to all of the benefits of that section and section 309. The latter section sets forth the procedure for the payment of claims pursuant to a final judgment in such proceeding. See *Garden Homes, Inc. v. Mason,* 238 F.2d 654 (1st Cir. 1956). As indicated in the Senate Report on the proposed 1965 amendments, the Department of Justice looked upon sections 308 and 309 as setting up a procedure which could be invoked to protect litigants who have attached property of the federal government without depriving the government of the use of its property. S. Rep. No. 234, 89th Cong., 1st Sess., P. 5 (1965).

To be sure, sections 308 and 309 do not contain any consent to sue

the government, and section 308 specifically declares that its enactment was not intended to broaden any pre-existing rights in private litigants. By implication, however, these statutes make it clear that where rights in property "owned or held by the United States, or in which the United States has or claims an interest" independently exist, private litigants may impress their liens and levy their attachments notwithstanding the concurrent government interest.

3. *Appellants' offer to subordinate their liens to the government's interest was misinterpreted by the District Court*

Offering to do equity just as they seek equity, and confident that the Interhandel fund was more than adequate to meet any claims which might conceivably be filed against the government in connection with its operation of GAF and the sale of the GAF stock, appellants offered in writing during the course of the District Court proceedings to postpone receipt of the monies to which they are entitled until the government is satisfied that such monies can be disbursed without injury to its security interest in the fund. Appellants proposed doing this in either of the following ways:

(a) by entering into a formal stipulation with the Attorney General or with the U.S. Attorney for the District of Columbia pursuant to 40 U.S.C. § 308, or

(b) by stipulating in advance with appellee Secretary of the Treasury that they will agree to the stay of execution of any judgments rendered in their favor until such time as the government is satisfied that such monies can be disbursed without injury to its security interest in the fund.

Unfortunately, these offers were misinterpreted by the District Court as a sign of weakness in appellants' cases (JA 53) and nothing came of them.

All that appellants seek on these appeals is an early opportunity to present evidence in support of their claims. To the extent that this can be facilitated by renewing their offers to formally subordinate their liens to the government's interest in the fund, appellants hereby restate their willingness to enter into the aforementioned stipulations with the appropriate government officials. Certainly, a court of equity is not lacking in power to mold a decree which would effectuate the terms of such agreements.

C. Substituted Service of Process on Interhandel Was Appropriate Under the Circumstances of These Cases

Appellants were entitled to rely upon the provisions of Rule 4(i)(1)(D), Fed. R. Civ. P., to effect service of process upon appellee Interhandel since their suits are by nature *in rem* proceedings, see 4 Pomeroy, *Equity Jurisprudence* § 1233 (5th ed. 1941); cf., *Houston v. Ormes*, 252 U.S. 469 (1920), and, for the reasons previously advanced, Interhandel's interest in the fund is such a *res* as will support substituted service of process. Accordingly, the District Court had jurisdiction over appellee corporation for purposes of requiring it to give proper acquittances to the United States, and, therefore, it was error to dismiss appellants' complaints for lack of adequate service of process.

II

Appellants' Suits Can Be Maintained Against the Government at the Present Time

A. The Doctrine of Sovereign Immunity Does Not Bar Appellants From Obtaining Relief

In *Dugan v. Rank*, 372 U.S. 609 (1963), the Supreme Court upheld the government's claim of immunity to suit under the circumstances of that case on the principle that the suit was one against the sovereign.

Its relevance to the instant cases lies in its summary of the criteria which would permit the United States, or an officer or agent thereof, to claim immunity from suit. They are set forth as follows:

> "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' Land v. Dollar, 330 U.S. 731, 738, 91 L.ed 1209, 1215, 67 S Ct. 1009 (1947), or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' Larson v. Domestic & Foreign Commerce Corp., supra (337 U.S. at 704); Re New York, 256 U.S. 490, 502, 65 L ed 1057, 1062, 41 S Ct 558 (1921)"

372 U.S. at 620

1. The judgments sought herein by appellants would not expend themselves on the public treasury or domain, and would not interfere with the public administration

Appellants herein are seeking to impress their equitable liens upon property which belongs to appellee Interhandel. The interest of the United States regarding that fund is strictly that of a pledgee. It has no interest in the pledged property other than a right to go to court to attempt to foreclose upon it in the event that Interhandel fails to perform its obligations under the Stipulation of Settlement. Such is made clear by this Court's ruling in *Hawley v. Hawley*, 72 App. D.C. 376, 114 F.2d 745 (1940), wherein it was stated:

> "Appellant contends that the testator thereby intended the stock to become the property of appellee if the note was not paid, and that appellee, by accepting the note and stock, bound herself to accept the stock in payment of the note. . . . The contention cannot be sustained. Even attributing to the statement signed by the testator the meaning placed thereon by appellant, the clause providing for forfeiture of the pledged

stock would be invalid and unenforceable. As was said in Haselden v. Hamer: '* * * "The pledgee is not entitled upon the pledgor's default to take the property as his own in satisfaction of the debt. A provision in the contract by which the absolute property in the pledge is to vest in the pledgee upon default of the pledgor is void and the pledgor is still entitled to redeem. Nor can the pledgee cut off the pledgor's interest in the collateral by a mere notice that if the debt is not paid by a certain time, he will take the collateral as his own."'

"This is the universally accepted rule. While it is undoubtedly true that after the pledge is given, the parties may lawfully agree that the creditor shall take the pledge in satisfaction of the debt, there was no such agreement in this case. On the contrary, appellant relies specifically upon the original agreement contained in the note. Under the circumstances, a default in payment of the secured debt gives the pledgee only a right to realize on it by some appropriate proceeding."

72 App. D.C. at 381-382, 114 F.2d at 750-751 (footnotes omitted)

Needless to say, the government does not come within the exception noted in the second paragraph of the quoted material because at the time the Stipulation was entered into, there was, of course, no debt with regard to which the parties could contract.

The government's entire interest regarding the fund is derived from its private, out-of-court, agreement with Interhandel. The pledged property was intended simply to afford the government a means whereby it could protect itself from the remote possibility that somebody or some foreign government might assert some claim against the United States, presumably in connection either with its management of GAF or the sale of Interhandel's interest in GAF. The Stipulation of Settle-

ment itself sheds no light upon the identity of these potential claimants or upon what might be the subject matter of their claims. Indeed, considering the restrictions imposed upon any of these unknown claimants by either the statute of limitations or the doctrine of laches, whichever might be applicable, and by the doctrine of sovereign immunity, it is difficult to conceive the possibility that there could be any successful claims made. That the United States realizes this is illustrated by the fact that it already has released approximately $60,000,000.00 of the fund to appellee corporation. (JA 50)

The instant suits in fact are suits against the fund itself and do not seek to recover anything from the government. See *Orinoco Co. v. Orinoco Iron Co., supra,* 54 App. D.C. at 225, 296 Fed. at 972. Accordingly appellants' positions with respect to the United States are neither antagonistic nor competitive. But even if they were, appellants' offer to formally subordinate their liens to the government's indemnity interest would overcome such an objection. Moreover, as pointed out *supra,* equity has ample power to frame its decrees in such a way as to avoid unnecessary injury to non-offending litigants, such as appellants and appellee Secretary in the instant case. If there were any possibility that the government's indemnity interest could be adversely affected by judgments in favor of appellants, it would be an easy matter for a court of equity to stay, or condition, the effect of its own judgments.

Nor do appellants' suits interfere in any way with any matter of public administration. All permissible actions that may be taken with respect to the Interhandel fund are prescribed in great detail in the Stipulation of Settlement. No demands are presented in the instant suits with regard to the administration of the fund.

2. The judgments sought herein by appellants would not restrain the government from acting, or compel it to act, with regard to any matter of a discretionary nature.

The rulings by the Supreme Court in *Mellon v. Orinoco Iron Co.*, 266 U.S. 122 (1924), and in *Houston v. Ormes, supra,* and by this Court in *McCormack v. Harrah, supra,* and in *Doerschuck v. Mellon,* 60 App. D.C. 383, 55 F.2d 741 (1931), demonstrate that the judgments sought by appellants herein, requiring the Secretary of the Treasury to satisfy their equitable liens from the fund presently in his hands, would require him to perform a purely ministerial duty. As already pointed out, the fund in question has been earmarked for payment to Interhandel and - unless the government takes affirmative action to foreclose upon the fund in the meantime - it is understood by all that the fund will in due course be distributed to Interhandel. If it should become necessary to do so, Interhandel itself may demand such action as a matter of right. That the act of making distribution, where ownership of the fund is not in issue, is a ministerial duty may be confirmed by reference to the cases cited at the beginning of this paragraph.

Appellee corporation's ownership of the fund in question is more clearly demonstrable in this case than in perhaps any other. The claimants in *Houston, Orinoco Co.* and *McCormack* each enjoyed, at best, an undivided interest in the general funds of the United States. Their money was commingled with that of the government. Here, Interhandel's property has been segregated into a special account. Its property earns interest from the United States and it is required to pay taxes on that income.

Appellees argue that the matter of payment involves the exercise of discretion by the Attorney General and, therefore, that the judgments sought by appellants would interfere with his performance of this discretionary act. The argument is based upon the fact that the Stipulation

of Settlement - which only is binding upon the parties thereto *inter se* - provides that no distribution shall be made to Interhandel unless the funds involved are first released by the Attorney General. (Section VIII, Subsection 1 JA 66) They look to this Court's opinion in *Kelberine v. Societe Internationale, etc., et al,* No. 19,286, decided April 7, 1966 (petitions for rehearing are presently pending) for comfort, but what is said there should not be controlling in these appeals.

The thrust of appellants' argument in *Kelberine* was not directed toward the interpretation or the implementation of the stipulation, but rather towards its validity. They directly challenged the authority of the United States to enter into the stipulation in the first place and sought to have it set aside. By so doing they not only sought to interfere with the government's security interest in the fund, but they boldly attempted to restrain the government from acting with regard to a matter of a discretionary nature, i.e., settling Civil Action No. 4360-48. For these reasons, *Kelberine* is not only distinguishable from the instant cases but it is a classic example of an unconsented suit against the government. *Kelberine* did not fit into the pattern of *Mellon v. Orinoco Iron Co.*, 266 U.S. 113 (1924), and *Houston v. Ormes, supra,* as do the present cases. In fact, appellants Kelberine and Berlin did not even claim an equitable lien. Noteworthy is the Court's conclusion in *Kelberine* that appellants failed to present a "thesis" which was "susceptible of judicial implementation." (slip opinion, p. 9)

The order of the Attorney General in the instant cases, unlike the various certifications and authorizations alluded to in *Mellon v. Orinoco Iron Co; Houston v. Ormes,* and *McCormack v. Harrah,* has nothing whatever to do with the ownership of the fund in question. The fund belongs to Interhandel anyway without the need for the Attorney General to take any action.

Until such time as the government might successfully foreclose

upon the fund, it can have no interest in any portion of the pledged property which would insulate it from appellants' liens. Consequently, there is no requirement that appellants delay in asserting and enforcing their equitable liens upon the fund until the government's claim becomes liquidated, if it ever does. In addition, it should be noted that none of the cases previously cited in this subsection prescribes as a condition to the assertion of an equitable lien upon a fund in the United States Treasury that the anticipated distribution must be scheduled to take place immediately or within any specified period of time. It is enough that, in due course, distribution to a known payee will take place.

Under the circumstances of the present cases, the language of *Doerschuck v. Mellon, supra,* has a particular significance. In that case, the holders of certain German bonds filed a bill of complaint to recover from a fund in the United States Treasury an amount of money which they claimed was owing to them as interest on their bonds. The money had been frozen in Germany during the course of World War I and was finally paid into the Treasury in 1927 pursuant to an award made by the German - American war claims commission. In reaching its conclusion that the bill had been improperly dismissed, this Court declared:

> "The suit instituted in this case is like Mellon v. Orinoco Iron Co., 266 U.S. 121, 45 S. Ct. 53, 69 L. Ed. 199, and Houston v. Ormes, 252 U.S. 469, 40 S. Ct. 369, 64 L. Ed. 667, and in those cases it was held that the payment by the government of a trust fund to the person entitled to receive it is a ministerial duty, the performance of which may be compelled by mandamus, and that, as a necessary consequence, where another has an equitable right in the fund he may have relief against the officials of the Treasury through a mandatory writ of injunction or a receivership."
>
> 60 App. D.C. at 386, 55 F.2d at 744.

The Secretary of the Treasury, as *de facto* trustee of the fund, has a duty to distribute the fund to the persons entitled to receive it. The fact that appellee Interhandel has entered into an out-of-court stipulation with the government can have no effect upon appellants' claims or upon their equitable interest in the fund. Accordingly, the duty to disburse being but a ministerial act under the circumstances of this case, appellants can impress their liens upon the fund at this time.

B. The Attorney General Is Not an Indispensable Party to These Proceedings

The test for determining whether or not a party is an indispensable party is based upon practical considerations. As appears from the foregoing, the judgments which appellants seek against the appellees herein will effectively grant the relief desired. The addition of the Attorney General as a party defendant to appellants' suits will serve no useful purpose and will not enable them to secure any relief to which they are not already entitled. Therefore, under the principle enunciated in *Williams v. Fanning*, 332 U.S. 490 (1947), it is seen that the Attorney General is not an indispensable party to these proceedings.

III

Equitable Principles Require That Appellants Be Permitted To Impress Their Liens at This Time

The familiar maxims that "equity regards as done that which ought to be done" and that "equity will not suffer a wrong without a remedy" have particular application to the facts of the instant case. Appellants have rendered substantial services to appellee corporation throughout the years and have contributed materially to the creation of the fund which is presently maintained in the hands of appellee Secretary of the Treasury. Both by virtue of express executory agreements and in order to prevent Interhandel from being unjustly enriched at their expense, appellants possess equitable liens upon that fund which entitle them to obtain compensation for their services out of that fund. Their liens are the means by which the personal obligations of Interhandel toward appellants may be effectively enforced. Yet appellees herein have sought to deny appellants their liens and, unless this Court will take appropriate action to preserve them, appellants' equitable liens are in grave danger of being lost.

The Interhandel fund is appellants' security. They seek only the opportunity to prove their claims against that fund but their efforts are being thwarted by appellees' resort to the doctrine of sovereign immunity. If appellees are permitted to take refuge behind this doctrine, the fund will disappear and appellants will be denied their compensation. Approximately $60,000,000.00 of the fund already has been disbursed to Interhandel without any public announcement. In due course, the balance in the fund will be distributed - also without any public notice. When will the fund be disbursed? Appellants do not know. How will it be disbursed? Appellants have no means of knowing. What will Interhandel

do with the proceeds of the fund after they have been received? Presumably the proceeds will be transferred immediately to Zurich, Switzerland - far beyond the reach of this Court's process for Appellee corporation is under no duty to retain the proceeds of the fund in this jurisdiction for any period of time after release. Indeed, they have no duty even to keep the proceeds in this country. Once the proceeds have been released by the Secretary of the Treasury, Interhandel is free to do with them as it wishes.

This factual setting is similar to that presented in *Western Urn Mfg. Co. v. American Pipe & Steel Corp.*, 113 U.S. App. D.C. 378, 308 F.2d 333 (1962). There the payee anticipated the receipt of certain funds from the United States Treasury at a certain date and time and its attorney here in Washington made prior arrangements with other parties to negotiate the Treasury check swiftly. A creditor of the payee knew of the existence of the fund but did not find out when it was to be paid out until the day on which it was disbursed. Acting immediately, the creditor took steps to attach the fund in the hands of the payee's attorney, but by the time the attachment was served - at 4:15 p.m. the same day - the attorney claimed that he no longer had any property belonging to the payee.

Appellants do not think that in justice and equity they should be required to play the old shell game with Interhandel in their attempt to secure just compensation. Appellants have presented a written request to the Attorney General asking him to advise them whenever it is contemplated that distribution will be made. While that official has acknowledged receipt of appellants' request, he has not committed himself in response to it. Consequently, the only way in which appellants can be assured an opportunity to prove their claims is to impress their equitable liens at the present time.

CONCLUSION

For the foregoing reasons, appellants believe that the District Court erred in dismissing their complaints and they maintain that in justice and equity they ought to be permitted to impress their equitable liens on the Interhandel fund at the present time.

Respectfully submitted,

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BRIEF FOR THE SECRETARY OF THE TREASURY, APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,995

ROBERT A. SCHMITZ, Appellant,

v.

SOCIETE INTERNATIONALE, etc., and HENRY H. FOWLER, Secretary of the Treasury, Appellees.

No. 19,996

HERMAN A. SCHMITZ, Et Al., Appellants,

v.

SOCIETE INTERNATIONALE, etc., and HENRY H. FOWLER, Secretary of the Treasury, Appellees.

ON APPEAL FROM ORDERS OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CARL EARDLEY,
Acting Assistant Attorney General,

DAVID G. BRESS,
United States Attorney,

MORTON HOLLANDER,
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QUESTION PRESENTED

In the opinion of appellee, the Secretary of the Treasury, the following question is presented:

Whether appellants' suits to enjoin the Secretary from paying certain funds to Societe Internationale out of the United States Treasury were properly dismissed by the district court on the ground that they constituted actions against the United States to which it had not consented.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,995

ROBERT A. SCHMITZ, Appellant,

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A. (INTERHANDEL) and HENRY H. FOWLER, Secretary of the Treasury of the United States of America,
Appellees.

No. 19,996

HERMAN A. SCHMITZ, ROBERT A. SCHMITZ and LLOYD J. VAIL, Executors of the Estate of Dietrich A. Schmitz, deceased,
Appellants,

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A. (INTERHANDEL) and HENRY H. FOWLER, Secretary of the Treasury of the United States of America,
Appellees.

ON APPEAL FROM ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE SECRETARY OF THE TREASURY, APPELLEE

COUNTERSTATEMENT OF THE CASE

1. Nature of the proceedings.

Appellants are individuals and their representatives who

allege that services which they rendered to appellee Societe Internationale, a Swiss holding corporation commonly referred to as Interhandel, entitle them to share in Interhandel's portion of the proceeds resulting from the settlement by the Swiss corporation and the Attorney General of the litigation over the vesting of certain property by the Alien Property Custodian. In an attempt to insure the payment of their claims in the event they should ultimately be successful in their action against Interhandel, appellants joined the Secretary of the Treasury as a co-defendant in order to reach the portion of Interhandel's settlement proceeds still in the United States Treasury. From the orders of the district court (Pine, J.) dismissing their suits for want of jurisdiction, Schmitz v. Societe Internationale, 249 F. Supp. 757, appellants prosecute these appeals.

2. Background.

This is another facet of the litigation which followed the 1942 vesting by the Alien Property Custodian of the American assets of the Swiss "interhandel" corporation. The assets vested consisted of the bulk of the stock of the General Aniline & Film Corporation. Thereafter, many years of protracted litigation ensued between Interhandel and the Attorney General to determine the propriety of that vesting.[1/] As the

1 / See, Societe Internationale v. Rogers, 357 U.S. 197, reversing, Societe Internationale v. Brownell, 100 U.S. App. D.C. 148, 243 F. 2d 254; Societe Internationale v. McGranery, 111 F. Supp. 435 (D. D.C.), affirmed, sub nom. Societe Internationale v. Brownell, 96 U.S. App. D.C. 232, 225 F. 2d 532, certiorari denied, 350 U.S. 937.

Court knows, the litigation between Interhandel and the Attorney General was finally settled in 1963. That settlement is memorialized by a "Stipulation of Settlement (December 20, 1963), as amended by the Supplementary Agreement of March 25, 1964)" filed in Societe Internationale v. Kennedy, Civil Action No. 4360-48 (D. D.C.). The portion of that Settlement Agreement relevant to this proceeding appears in the Joint Appendix (J.A. 57-61).

Under the terms of the settlement, the vested G.A.F. stock was sold to the public in March of 1965. Some $329,000,000 was realized from the sale, of which $120,000,000 was Interhandel's share of the proceeds. The Settlement Agreement, however, subjected Interhandel's share to certain express indemnity provisions in favor of the government (Secs. VIII and IX, J.A. 66-68). To carry out the terms of the agreement, Interhandel's portion of the proceeds was placed in a special Treasury account and invested in United States interest-bearing securities (J.A. 66). These securities were retained by the United States and may be used by the government to satisfy those indemnity obligations (Section IX(5), J.A. 68-69).

Under that agreement, Interhandel must hold harmless the United States Government, the Attorney General, and other government employees from claims of certain other persons and of the Netherlands Government relating to the shares sold and to the operations of the General Aniline & Film Corporation while it was under Government control (J.A. 67-68). In

particular, the agreement specifically provides that Interhandel's funds (J.A. 66, emphasis added):

> shall be deposited into an account to be maintained by the United States Treasury to be designated as Interhandel Corporation of Switzerland, payable only on order of the Attorney General, according to the provisions of Section VIII and IX of this Stipulation.

Section VII further provides that payments from that account shall be made to Interhandel (J.A. 67):

> [F]rom time to time as determined by the Attorney General, to the extent that the Attorney General determines that such securities are no longer needed to secure the faithful performance by Interhandel of the indemnity provisions imposed upon it by Section IX of this Stipulation.

3. The proceedings in the district court.

Appellants filed these suits on August 5, 1965, against both Interhandel and the Secretary of the Treasury (J.A. 3, 22). In substance, they sought to recover for themselves some $17,000,000 of the monies payable to Interhandel. They claimed this sum was due them for services allegedly rendered to that Swiss corporation. To insure their recovery, appellants sought to impress an equitable lien upon proceeds of the sale of the G.A.F. stock in the Treasury account, to enjoin the Secretary from disbursing any money to Interhandel, and to require the Secretary of the Treasury to satisfy appellants' claims against Interhandel out of the funds in the Treasury.

Both the Secretary and Interhandel moved to dismiss the complaints. The Secretarys' motions asserted that the suits were actually suits against the United States to which it had not consented and that, therefore, the district court lacked

jurisdiction to entertain the actions. (J.A. 18,43). On January 19, 1966, the district court (Pine, J.) granted the motions to dismiss. Schmitz v. Societe Internationale, 249 F. Supp. 757 (J.A. 44). The court ruled that (249 F. Supp. at 762, J.A. 52):

> In order to impress an equitable lien upon a fund in the United States Treasury, it is necessary that there exist several elements, namely, the Treasury officials must be charged with the performance of no duty other than the ministerial duty of making disbursement of the fund. It must be such a duty as could be compelled by mandamus, or a receivership. The United States must not be in the position of a debtor or creditor, but the fund must be an especially earmarked account to which the Treasury officials are under no other responsibility than that of the ordinary stakeholder, and the United States must have no claim or interest in the fund.
>
> Applying these principles to the instant case, there would seem to be no doubt that these necessary elements are lacking. Here the United States has a direct and real interest, namely, the retention of the fund to indemnify it and certain federal officials from liability arising out of the sale of GAF stock. Here the defendant Secretary has no right to make any disposition of the fund except upon the order of the Attorney General. Here the Attorney General is not a party to the suit, and if he were, clearly his duties in connection with the fund are not ministerial but involve discretion. Here neither the United States nor defendant Secretary is a mere stakeholder, but he is holding the funds for the benefit of the United States. Here the action is clearly one against the United States which has not consented to be sued.

From the formal orders of dismissal entered by the district court on January 25, 1966 (J.A. 55-56), appellants noted these appeals. (J.A. 57.)

SUMMARY OF ARGUMENT

I

Appellants sued Interhandel to recover compensation allegedly due them from that Swiss corporation. In an attempt to insure satisfaction of their judgment in the event they prevailed against Interhandel, appellants joined the Secretary of the Treasury as co-defendant. Their purpose in so doing was to obtain a court order enjoining payment to Interhandel of certain funds on deposit in the Treasury and to require payment of $17,000,000 of those funds to themselves instead. The actions against the Secretary are thus in reality suits against the United States because the judgment would expend itself upon the Treasury and interfere with the administration of the government. Dugan v. Rank, 372 U.S. 609; Hawaii v. Gordon, 373 U.S. 57; Kelberine v. Societe Internationale, No. 19,826, C.A.D.C., decided April 7, 1966, rehearing and rehearing en banc denied, June 16, 1966. As those cases make clear, the United States may not be sued without its consent. As the government has not consented to this action, the court below correctly dismissed the complaints against the Secretary of the Treasury for want of jurisdiction. Kelberine v. Societe Internationale, supra.

II

Appellants do not come within the doctrine of Mellon v. Orinoco, 266 U.S. 121, and Houston v. Ormes, 252 U.S. 469, which

permit, under certain circumstances, a person claiming a specific interest in a fund in the Treasury earmarked for payment to a given individual to enjoin its payment pending his action against the person for whom the fund was appropriated. To maintain such an action, the cited Supreme Court decisions require a plaintiff to show, first, that the United States is a mere "stakeholder" and has no interest in the fund which plaintiff is attempting to reach; second, that the only duty on the part of the government official sued is the ministerial act of payment, as to which he has no discretion, and, third, that the court has jurisdiction over the person of the alleged debtor so that it can be compelled to give the United States a proper acquittance. This Court's recent decision in Kelberine v. Societe Internationale, supra, which dealt with the Secretary of the Treasury's duties regarding the identical fund which these appellants seek to reach, makes clear that the circumstances of this case do not fall within the Mellon v. Orinoco and Houston v. Ormes, situations. In Kelberine, the Court held that the government has an interest in the funds in question because it holds them as security for Interhandel's performance of certain indemnity obligations which that corporation assumed, and, moreover, that the Secretary's duties to pay that fund were not ministerial and could not be compelled by mandamus because when those funds would paid out, if ever, was expressly committed to the judgment and discretion of the Attorney General. In this regard, the appellants' suits are indistinguishable from

Kelberine. The district court therefore correctly dismissed appellants' actions as suits against the United States to which it has not consented.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY RULED THAT THESE ACTIONS ARE UNCONSENTED SUITS AGAINST THE UNITED STATES.

1. In 1963, in order to conclude their twenty-year dispute over the ownership of the vested stock of the General Aniline & Film Corporation, the government and Interhandel agreed that the latter would drop its suit under Section 9 of the Trading with the Enemy Act (50U.S.C. App. 9) to recover the shares in suit, the shares would be sold, and the proceeds of sale divided between the parties according to a fixed formula. After the stock was sold for several hundred million dollars, appellants commenced this action. They claim entitlement to a $17,000,000 part of Interhandel's share of the proceeds. Appellants seek to insure satisfaction of the claims which they assert against that corporation by means of this action against the Secretary of the Treasury. We submit that the Court's decision in Kelberine v. Societe Internationale, No. 19,826, decided April 7, 1966, rehearing and rehearing en banc denied June 16, 1966, is dispositive of this appeal and that, therefore, the district court was entirely correct in dismissing the complaints against the Secretary for want

of jurisdiction on the ground that these actions are suits against the United States to which it has not consented.

2. The appellants have framed their complaints in the form of actions against the Secretary of the Treasury. On numerous occasions both the Supreme Court and this Court have held that, absent an express waiver of sovereign immunity, a court may not entertain a suit which, while nominally against an officer of the United States, is in reality against the government itself. Mine Safety Co. v. Forrestal, 326 U.S. 371; Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682; Malone v. Bowdoin, 369 U.S. 643; Dugan v. Rank, 372 U.S. 609; Hawaii v. Gordon, 373 U.S. 57; Mitchell v. McNamara, 121 U.S. App. D.C. 326, 352 F. 2d 700; Kelberine v. Societe Internationale, supra. The foregoing cases reiterate the standards for determining when a suit is actually one against the United States. "The general rule is that the relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." Hawaii v. Gordon, 373 U.S. at 58. And the decree would operate against the government "if the judgment sought would expend itself on the public Treasury or domain, or interfere with the public administration, Land v. Dollar, 330 U.S. 731, 738, or if the effect of the judgment would be 'to restrain the Government from acting, or compel it to act.' Larson v. Domestic & Foreign Corp., [337 U.S. 682] at 704 * * * ." Dugan v. Rank, 372 U.S. at 620. It is the essential nature and effect of the proceedings and not the form of the action which

determines the impact of the action on the United States. Mine Safety Company v. Forrestal, supra, 326 U.S. at 374.

Since appellant's purpose in bringing this action is to restrain government officials from fulfilling the terms of an agreement terminating a major lawsuit against the government, there can be no doubt that this is a suit against the United States under that rule. Therefore, without the government's consent the action cannot be maintained. Hawaii v. Gordon, 373 U.S. 57; Dugan v. Rank, supra; Malone v. Bowdoin, 369 U.S. 643; Kelberine v. Societe Internationale, supra.

3. Appellants do not contend that the government has in any way consented to this action, as indeed it has not.[2/] Rather, they attempt to bring themselves within an exception to that rule of sovereign immunity by invoking the doctrine announced in Houston v. Ormes, 252 U.S. 469, and Mellon v. Orinoco, 266 U.S. 121. Those cases permit, under discrete circumstances, litigants to reach funds in the Treasury specifically earmarked for payment to named individuals. As we show in the next point, the district court correctly ruled that the doctrine of those cases is of no assistance to appellants.

2/ While appellants have reprinted 40 U.S.C. 308 and 309 in their brief (pp. 4-6), they concede (brief, pp. 20-21) "To be sure sections 308 and 309 do not contain any consent to sue the government." This concession is not surprising in view of the express language of section 308 that:

> Nothing herein contained shall, however, be considered as recognizing or conceding any right to enforce by seizure, arrest, attachment, or any judicial process, any claim against any property held, owned, or employed by the United States, or by any department thereof, for any public use, or as waiving any objection to any proceeding instituted to enforce any such claim.

As the court below correctly noted (J.A. 53), section 309 depends on section 308.

II

APPELLANTS DO NOT COME WITHIN THE RULE OF MELLON V. ORINOCO AND HOUSTON V. ORMES.

1. In Mellon v. Orinoco, 266 U.S. 121, and Houston v. Ormes, 252 U.S. 469, the Supreme Court held that where a specific fund has been appropriated by the United States for payment to a named person, and this fund has been delivered into the possession of the Secretary of the Treasury to perform the purely "ministerial" act of payment, a person claiming a specific interest in that particular fund tantamount to an "equitable lien" may enjoin its payment pending his action against the person for whom the fund was appropriated.

Thus, in Houston v. Ormes, supra, Congress appropriated a $1,200 fund to satisfy a Court of Claims award to an individual and referred the fund to the Secretary of the Treasury for disbursement. The attorney for the individual, who had instituted an action against the latter for attorney's fees connected with the Court of Claims proceeding, sought to impress an "equitable lien" upon the fund. The Court allowed the lien, holding that joining the Secretary of the Treasury and the Treasurer of the United States in the action did not amount to a suit against the United States since only a "ministerial" duty involving "no discretion" remained to be performed and that the government

officials could be enjoined as individuals to surrender the fund to a receiver appointed by the Court. In reaching that conclusion, the Court stressed that the United States had absolutely no claim or interest in the fund and that inasmuch as the attorney's nonresident client had voluntarily appeared and personal jurisdiction had been obtained over her, she could be required to give a good acquittance to the United States, which would thereafter be excused from liability for the $1,200.

Similarly, in Mellon v. Orinoco, supra, the Secretary of the Treasury and the Treasurer of the United States had possession of a specific fund which the Department of State had obtained from Venezuela on behalf of United States citizens as reparations for expropriation of their property rights in Venezuela. The government officials proposed to pay this fund, which had been appropriated by Act of Congress, to Orinoco Company, Limited, one of the claimants. The Orinoco Iron Company, however, another claimant, brought an action to enjoin the officials from making this payment on the ground that it was entitled to a portion of the proceeds. The Supreme Court sustained a lower court injunction restraining the payment upon the grounds that Orinoco Iron Company had a valid equitable lien upon this fund, and that the government officials conceded that they were stakeholders and had no remaining duties other than the ministerial act of payment.

From these cases and others,[3] a plaintiff seeking to enforce an equitable lien against funds in the Treasury must establish first, that the United States has no claim or interest in the fund he is attempting to reach and is, in effect, a mere "stakeholder;" second, that at the time the injunction is sought, the only duty remaining to be performed by the government officials is the purely ministerial duty of payment involving no discretion whatsoever; and, third, that the court has jurisdiction over the person of the alleged debtor (here, Societe Internationale), so that the debtor can be compelled to give the United States a proper acquittance.

2. This Court's decision of April 7, 1966, in the case of Kelberine v. Societe Internationale, No. 19286, C.A.D.C., rehearing and and rehearing en banc denied June 16, 1966, makes clear that the court below was correct in holding that the elements necessary to maintain these actions against the Secretary of the Treasury are not present here.[4]

3/ See also, Ducker v. Butler, 70 App. D.C. 103, 104 F.2d 236, 238; Smith v. Harrah, 65 App. D.C. 258, 51 F.2d 314.

4/ The district court had rendered its decision in this case on January 19, 1966, before Kelberine was handed down by this Court. While we believe that appellants have not obtained jurisdiction over Interhandel in this proceeding, we leave the discussion of that issue to co-appellee. Cf., Kelberine v. Societe Internationale, supra, point II, slip opinion, pp. 5-7.

As its full title indicates, Kelberine was also a suit against both Interhandel and the Secretary of the Treasury. As do appellants here, plaintiffs in Kelberine claimed a right to Interhandel's share of the proceeds resulting from the sale of the General Aniline & Film stock under the Settlement Agreement with the Attorney General. And, as in the case at bar, plaintiffs in Kelberine sought to enjoin payments of the funds in the Treasury to Interhandel pending resolution of their own suit against that Swiss corporation. And--precisely as he did in this case--the Secretary moved to dismiss the suit as to him as an unconsented action against the United States. Just as do appellants here, plaintiffs in Kelberine invoked Houston v. Ormes, supra, and Mellon v. Orinoco, supra, as support for their contention that the district court had jurisdiction to entertain their action against the Secretary. The district court dismissed Kelberine's suit for want of jurisdiction and this Court affirmed that dismissal.

In rejecting as misplaced Kelberine's reliance upon the doctrine of Houston v. Ormes, this Court ruled that "it was amply clear" that the United States had an interest in the funds in the Treasury and that it was not merely a ministerial duty on the part of the Secretary to turn those funds over to Interhandel. We submit that the Kelberine decision is controlling and dispositive here. For this reason,

we set out the Court's decision on this issue in full (slip opinion, pp. 8-10, footnotes omitted):

> Did the court err in dismissing the action against the Government officers? We think it did not.
>
> Pending in the court here was a civil action by Interhandel against the Attorney General concerning properties vested in him by virtue of a federal statute. The President, by a memorandum dated January 8, 1963, and under authority vested in him by statute, determined that the interest of the United States required the sale of this property. The Attorney General had power to settle the litigation. He settled it. One of the terms of the stipulation of settlement was that the funds would be held by the United States as security for the performance by Interhandel of certain indemnity obligations imposed upon it by the agreement. Sec. VIII(4).). Those obligations (Sec. IX(2)) were that Interhandel would hold harmless the United States and its officers and employees from any claim made relating to actions described in certain paragraphs of the stipulation, or resulting from compliance by any officer of the United States with the stipulation, and from any claim made relating to the control or operation of the General Aniline and Film Corporation by Interhandel, or any of its stockholders, or persons under its control, or successors to such persons. Further, Interhandel agreed (Sec. IX(2)) to indemnify the United States and its officers and employees from any claims brought by the Government of the Netherlands on behalf of itself or its political subdivisions, Interhandel or persons under its control, or any Dutch national person, in respect to the properties subject to the stipulation. The stipulation provided that the United States could recover sums due by reason of the indemnities either by payment or by cancellation of the securities in which the properties were invested. And it provided (Sec. VIII(4)) that redemptions of these properties for Interhandel could be made from time to time as the Attorney General determines that such securities are no longer needed to secure the performance by Interhandel of its indemnity obligations. Thus it is amply clear that the United States has an interest in these securities and that its officers are performing official duties involving judgment and discretion,

not mere ministerial chores. The action was to require these officers to turn over to plaintiffs these securities and also to prevent them from carrying out the obligations of the stipulation of settlement. Thus the action is against the United States, which has not consented to it. It was correctly dismissed.

Plaintiffs cite and rely upon Mellon v. Orinoco Iron Co. and Houston v. Ormes. None of the criteria listed in those cases as premises for exceptions to the general rule respecting unconsented-to suits against the United States are present in the case at bar.

Moreover (although the point is immaterial in view of the foregoing) plaintiffs specifically and expressly asserted to the trial court that they claim no equitable lien upon the funds being held in the Interhandel account. Thus they are in the position of persons merely interested in the common good and, under the doctrine of Massachusetts v. Mellon, have no standing to sue.

We submit that the Court's decision in Kelberine is on all fours with the instant case, both in the theory advanced by appellants and in the result which the law requires.

3. Appellant seeks to distinguish Kelberine on the grounds that the plaintiffs there did not assert an equitable lien on the funds in the Treasury. As the last paragraph quoted above makes perfectly clear, however, the question of the presence or absence of an equitable lien was "immaterial" to the Court's decision in Kelberine.

Appellants also assert that they may maintain this action because they are willing to postpone receipt of the money to which they claim entitlement until the government is satisfied that such money can be disbursed without injury to its security interest. We note, first, that the same argument was made by counsel on behalf of Kelberine and not accepted by the Court, and, second, appellants cite no authority which supports jurisdiction over the United States on this new theory.[5/] Houston v. Ormes and Mellon v. Orinoco represent narrow exceptions to the prevailing rule that the government may not be sued without its express consent. Appellants do not come within those exceptions. Kelberine v. Societe Internationale, supra.

5/ As we noted above, p .10 , 40 U.S.C. 308 and 309 in terms reject the contention that they recognize any right to claim property in the government's possession. Stevan v. Union Trust Co., 115 U.S. App. D.C. 36, 316 F.2d 687, was not a suit against the United States. In United States v. Leventhal, 114 U.S. App. D.C. 340, 316 F.2d 314, it was the United States that was asserting the priority of its tax lien on property in the custody of the court. Hawley v. Hawley, 72 App. D.C. 376, 114 F.2d 745, and Western Urn Mfg. Co. v. American Pile & Steel Corp., 113 U.S. App. D.C. 378, 308 F.2d 333, were litigations between private parties only. They did not, therefore, even purport to consider the jurisdiction of the district court to entertain actions against the United States. In Doerschuck v. Mellon, 60 App. D.C. 383, 55 F.2d 741, 744, this Court was careful to note that--unlike the instant proceeding--the money in the Treasury was "a special fund to which the United States make no claim and assume no liability."

Finally, in part 3 of their brief (p. 30) appellants urge that "equitable principles" require that they be permitted to press their liens at this time. Their lawsuit, however, arises entirely out of an arrangement allegedly entered into between themselves and Interhandel, and wherever the equities may lie in that situation is a private matter between those parties. Equitable principles, of course, cannot take the place of the absent consent of the United States to suit, which is the prerequisite to the district court's jurisdiction.

CONCLUSION

For the reasons stated, the orders of the district court dismissing the complaints against the Secretary of the Treasury should be affirmed.

Respectfully submitted,

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Acting Assistant Attorney General.

DAVID G. BRESS,
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AUGUST 1966.

BRIEF FOR APPELLEE,
SOCIETE INTERNATIONALE, ETC.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,995

ROBERT A. SCHMITZ, *Appellant,*

v.

SOCIETE INTERNATIONALE, etc., and HENRY H. FOWLER, Secretary of the Treasury, *Appellees.*

No. 19,996

HERMAN A. SCHMITZ, ET AL., *Appellants,*

v.

SOCIETE INTERNATIONALE, etc., and HENRY H. FOWLER, Secretary of the Treasury, *Appellees.*

Appeals from Orders of the United States District Court for the District of Columbia

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QUESTIONS PRESENTED

In the opinion of Appellee, Societe Internationale, etc. (Interhandel), the questions presented by these appeals are as follows:

1. Whether the decision of this Court in *Kelberine* v. *Societe Internationale, etc.*, U.S. App. D.C. , F. 2d (No. 19,286 decided April 7, 1966, Petition for Rehearing denied June 16, 1966), requires dismissal of Appellants' complaints?

2. Whether the lower court properly found that the substituted service of process on Interhandel was improper?

3. Whether there was a *res*, and an enforcible equitable lien there on, sufficient to support mail service in Switzerland upon a nonresident foreign corporation alleged to be a debtor of plaintiffs.

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STATUTES:

Section 13-336 D.C. Code (1961 ed. Supp. V) 15
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FEDERAL RULE OF CIVIL PROCEDURE:

Rule 4(i)(1)(D) 6, 15

* Cases marked with asterisks chiefly relied upon.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,995

ROBERT A. SCHMITZ, *Appellant*,

v.

SOCIETE INTERNATIONALE, etc.,[1] and HENRY H. FOWLER, Secretary of the Treasury, *Appellees*.

No. 19,996

HERMAN A. SCHMITZ, ET AL., *Appellants*,

v.

SOCIETE INTERNATIONALE, etc., and HENRY H. FOWLER, Secretary of the Treasury, *Appellees*.

Appeals from Orders of the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE, SOCIETE INTERNATIONALE, ETC.

COUNTERSTATEMENT OF THE CASES

A. Introduction

The Appellants' brief goes to great lengths to detail the facts that were alleged in their individual complaints. They then proceed to argue from the premise that all of the facts alleged in their complaints have been admitted

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[1] Appellee, Societe Internationale, etc., is frequently called "Interhandel." It may be referred to herein by that name.

by the Appellees for purposes of their motions to dismiss (Appellants' Brief, p. 9). The Appellants overlook the fact that Interhandel denied under oath every averment upon which the Appellants rely to support their claims for relief. These denials are contained in affidavits filed by Interhandel in support of its motions to dismiss and/or quash return of service of summons (J.A. 15-17, 19 and 36-42). Therefore, lest there be any doubt as to Interhandel's position as to the merits of the Appellants' claims, the following discussion will show that each material averment upon which the Appellants must rely to support the substituted service of process has been denied under oath.

B. The Dietrich A. Schmitz Complaint. No. 19,996

This complaint is made up of a series of general background allegations of heroically epic proportions which build up to a conclusion that from 1941, when Schmitz was deposed as president of General Aniline and Film Corporation (G.A.F) (J.A. 26) until his death in 1965 (J.A. 23), he underwent severe hardship and persecution, performed services for Interhandel of a value of $7,500,000.00 and sustained losses in defending Interhandel in the amount of $2,500,000.00. In short, his estate is claiming a total of $10,000,000.00 for services allegedly rendered and costs incurred after he was ousted from office (J.A. 31).

The entire complaint is a self-serving pleading, designed to establish decedent's entitlement to an equitable lien on a fund in the Treasury. An example appears in paragraph 20 which states:

> "Defendant Interhandel, through Dr. Sturzenegger, and later through Dr. Alfred Schaefer, recognized that it was indebted to decedent for his efforts and expenditures on its behalf and promised to make him whole and to compensate him for his efforts on behalf of defendant Interhandel from whatever funds were ultimately recovered from the United States government." (J.A. 31)

Inasmuch as the jurisdiction of the lower court might turn on the truth or falsity of this allegation, Interhandel, in support of its motion to dismiss and/or quash return of summons, submitted affidavits of Dr. Sturzenegger and Dr. Schaefer, both of whom unqualifiedly denied the allegations of paragraph 20. Dr. Schaefer's affidavit is set forth in full at J.A. 37-38. Referring specifically to paragraph 20 it states:

> "... I deny that Interhandel, through me, recognized that it was indebted to Mr. Dietrich A. Schmitz in any sum whatever for any alleged efforts and expenditures, and I further deny that Interhandel, through me, ever made any of the promises alleged in said paragraph; that I never met, talked to or communicated with or in any way had any contact, directly or indirectly, with Mr. Schmitz; and so far as I know Mr. Schmitz never requested any payment of any kind whatever from Interhandel for doing anything set forth in said complaint; and since I became connected with Interhandel Mr. Schmitz did not act, and was not authorized to act, in any capacity for Interhandel, and there did not come to my attention any elleged activities by Mr. Schmitz on behalf of Interhandel."

The affidavit of Dr. Sturzenegger denies the allegations of paragraph 20 in the following language: (J.A. 38-39):

> "... I was acquainted with plaintiffs' decedent Dietrich A. Schmitz during his lifetime; that soon after Mr. Schmitz ceased to be president of General Aniline & Film Corporation in 1941 he no longer represented the interests of Interhandel in the United States and thereafter Interhandel was represented by others, chiefly lawyers, the principal one being John J. Wilson of Washington; and affiant denies the averments of paragraph 20 of said complaint that through him Interhandel either recognized that it was indebted to Mr. Schmitz in any sum whatever or made any of the promises set forth therein; and affiant further states that so far as he knows Mr. Schmitz never requested any payment of any kind whatever from Interhandel for doing anything set forth in said complaint."

Interhandel's attorney, John J. Wilson, also submitted an affidavit in support of the motion. It established that he has been Interhandel's lawyer since before Pearl Harbor; that he met Mr. Schmitz after he (Mr. Schmitz) had been ousted and before Pearl Harbor; that Dietrich A. Schmitz never told him he was a representative or attorney-in-fact of Interhandel; that any person lawfully representing Interhandel during the war years was required to obtain a license from the Foreign Funds Control of the Treasury Department and also register as an agent for Interhandel under the Foreign Agents Registration Act; that he, John J. Wilson, obtained a license and registered as required, whereas Dietrich A. Schmitz never obtained a license or registered; that affiant became well acquainted with the Interhandel officers and no one connected with Interhandel ever stated or indicated to him that Dietrich A. Schmitz was a representative of Interhandel in the United States after he ceased to be president of General Aniline & Film Corporation (J.A. 40-42). Paragraph No. 2 of the Wilson affidavit also denies the general allegations made in several paragraphs of the complaint that Dietrich A. Schmitz "performed services or exerted efforts" resulting in the creation of the fund (J.A. 40).

Thus, the facts of record regarding the claimed equitable lien of Dietrich A. Schmitz in Case No. 19,996 are in direct conflict.

C. The Robert A. Schmitz Complaint, No. 19,995

The record shows the same factual conflict exists as to the allegations of the complaint of Robert A. Schmitz, the son of Dietrich A. Schmitz. This complaint is in two counts.

The first count alleges that Interhandel owes Robert A. Schmitz $7,250,000.00 for services rendered during the eighteen-month period from December 1958 through May 23, 1960 (J.A. 7-8 and 10). The allegations supporting

this claim are that this Appellant was well acquainted with Interhandel's affairs through the years (J.A. 5-6); that from time to time he dealt with Interhandel officers on behalf of five corporations desiring to purchase Interhandel's interest in G.A.F. (J.A. 5-6); that in December 1958 he was solicited by Interhandel to cooperate in effecting an arrangement whereby one Charles E. Wilson would be granted full authority to negotiate a settlement of Interhandel's Trading With the Enemy Act suit (J.A. 6-7); and that he cooperated to this end from that time until May 23, 1960 when Charles E. Wilson accepted the trusteeship (J.A. 7-9).

The nub of the cause of action stated in the first count is found in paragraph 11 of the complaint which alleges that Dr. Schaefer, in October 1959, orally agreed that Interhandel would pay Robert A. Schmitz:

> ". . . for the services he had performed 5% of any monies which defendant Interhandel might receive in settlement of its dispute with the United States government, payment to be made when the settlement funds due Interhandel became available. *Dr. Schaefer stated* . . . that this compensation would necessarily have to come out of the specific settlement proceeds of the subject matter of this dispute with the United States government." (J.A. 9) (Emphasis added)

The affidavit of Dr. Schaefer flatly denies such allegations, stating, in part (J.A. 19):

> ". . . and in support of Interhandel's motion as above described he specifically denies each and every statement made in the eleventh paragraph of the first count thereof."

John J. Wilson also filed an affidavit in support of the motion, to show the absence of an equitable lien under either count of the complaint. After summarizing his extensive connection with the Interhandel litigation, Mr. Wilson denied: (1) that Robert A. Schmitz "performed

services in the creation or preservation of the fund" as Interhandel's agent or otherwise; (2) that Charles E. Wilson's activities greatly facilitated the settlement of Interhandel's suit and greatly enhanced the amount of the settlement; and (3) that Robert A. Schmitz obtained any results that either contributed to the settlement or proved to be advantageous to Interhandel (J.A. 16-17).

The second count claims that Interhandel owes Robert A. Schmitz the sum of $112,000.00 for services rendered during the period from June 1, 1960 through December 31, 1961 (J.A. 10-11). This claim is based on *quantum meruit*. It is alleged that Robert A. Schmitz' assistance and advice were solicited by Interhandel during the period of Charles E. Wilson's trusteeship; that he performed extensive valuable services during this period and that it was understood he would be paid for such services even though no final agreement was reached regarding the amount or rate of compensation (J.A. 10-11). This count does not allege that Robert A. Schmitz was to be paid from the proceeds of settlement, although it incorporates by reference several paragraphs of the first count, including the third paragraph which claims an equitable lien upon the fund in the Treasury.

D. Motions and Decision in Court Below

The Appellants attempted to effect service of process under Rule 4(i)(1)(D) of the Federal Rules of Civil Procedure, by having the Clerk of the court below mail copies of the summons and the complaints to Interhandel in Switzerland by registered mail (J.A. 14, 35-36).

Interhandel, on the basis of the above-described affidavits, moved in both cases to dismiss the action and/or to quash return of service of summons (J.A. 15, 36-37). The affidavits were attached to and made a part of the motions. Thus, Interhandel's motion papers met head-on the material factual averments of the complaints. This

was deemed necessary to prevent the lower court from assuming jurisdiction—if all other elements were present—on the theory that, *prima facie,* the Appellants had shown that they had equitable liens on the fund. Moreover, the Appellants' demands for *in personam* as well as *in rem* judgments dictated this course of action (J.A. 11-12, 32). Thus, the threshold jurisdictional issue, in the event that it was determined that these were not unconsented suits against the United States, was the existence or non-existence of a *res* in the District of Columbia and alleged equitable liens thereon.

Interhandel's motions very succinctly posed this jurisdictional issue, advancing the ground that the

> "* * * purported service is a nullity because it is predicated upon the assumed existence of a *res* in the District of Columbia and upon a claim to or lien upon such *res* on the part of the plaintiff, none of which actually exists * * *" (J.A. 15, 36)

Interhandel's motions, together with the motions to dismiss of the government co-Appellee, were heard together and the lower court rendered its opinion (J.A. 44-55) and ordered the complaints dismissed (J.A. 55, 56). The court's opinion, after finding, *inter alia,* that "the action is clearly one against the United States which has not consented to be sued", held:

> "The action, therefore, cannot be maintained because it fails to state a claim upon which relief may be granted, does not present the requisite facts for the establishment of an equitable lien and therefore does not provide the basis for substituted service of process as attempted." (J.A. 52)

STATUTES AND RULES

Pertinent statutes and Federal Rule of Civil Procedure are printed in the Appendix to this brief.

SUMMARY OF ARGUMENT

The Settlement Agreement between Interhandel and the Attorney General of the Unitd States, involved in *Kelberine* v. *Societe Internationale, etc.,* U.S. App. D.C. , F. 2d (No. 19,286 decided April 7, 1966, petition for rehearing denied June 16, 1966) is the same one involved in the instant cases. There are two principal differences between *Kelberine* and these cases, but they do not affect the ultimate result of dismissal of the actions.

In *Kelberine,* no equitable lien was claimed upon the fund in the Treasury, while one is claimed here; and in *Kelberine in personam* service was held to be effected upon Interhandel in the District of Columbia, while only substituted service by mail upon Interhandel in Switzerland under Rule 4(i)(1)(D) F.R. Civ. P., is involved here.

In *Kelberine* (in both courts), and in the case at bar in the lower court, the indemnity feature of the fund in the Treasury and the discretionary function of the Attorney General defeated the action against the government officials. Doubtless, this Court will again affirm as to the co-Appellee Secretary of the Treasury, since the situation is identical with *Kelberine.*

In *Kelberine* in this Court, the action was dismissed as to Interhandel because it was not of a justiciable nature. The case at bar was dismissed below as to Interhandel because substituted service was ineffective since no equitable lien (assuming the factual basis for one) could reach or be impressed upon the fund in the Treasury due to the grounds that defeated the action as to the Secretary of the Treasury. In effect, there was no unrestricted or available *res.*

Thus, when the Secretary of the Treasury prevails in the case at bar, Interhandel must also prevail.

ARGUMENT

The Lower Court Correctly Held That There Was an Insufficient Basis to Support the Substituted Service of Process on Interhandel[2]

The lower court did not find it necessary to resolve the conflict between the parties as to the factual basis for the existence of an equitable lien (J.A. 54).[3] Instead, by reason of the status of the fund in the Treasury, Judge Pine decided that no equitable lien could exist, and that since this was so, substituted service of process was ineffective. In this reasoning, the district judge was clearly right.

Thus, in this posture, the cases turn upon the fact that Appellants cannot reach the fund in the Treasury. Judge Pine, while believing that a *res*, "in a general sense" exists, held, in effect, that it was not a *res* "which can be reached by the plaintiff for the purpose of maintaining his suit against Interhandel and for the payment of his alleged claim." (J.A. 50)[4] In other words, instead of treating the status of the fund in the Treasury as defeating the existence of a *res*, and hence no equitable lien could be impressed upon it, as Interhandel argued, the court below assumed the limited existence of a *res* but still found

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[2] It seems clear that the second count of the Robert Schmitz complaint does not really involve an equitable lien (*Cf. Voliva* v. *Bennett*, 201 F. 2d 434 (5th Cir. 1953)), since it fails to allege that Appellant would be paid out of the settlement proceeds (see *Lindberg* v. *Humphrey*, 53 App. D.C. 243, 289 F. 901 (1923)). However, Judge Pine did not treat the two counts differently, and this Appellee will ignore the distinction in this brief.

[3] Interhandel had argued below that in the face of the sworn denials, averments of the complaints could not be accepted as true. See *KVOS* v. *Associated Press*, 299 U.S. 269, 81 L. Ed. 183 (1936); *McNutt* v. *General Motors Acceptance Corporation*, 298 U.S. 178, 80 L. Ed. 1135 (1936); and *Chase* v. *Wetzlar*, 225 U.S. 79, 56 L. Ed. 990 (1912). A case squarely in point, and to the same effect as the foregoing cases, but not cited below, is *Spears* v. *Spears*, 162 F. 2d 345 (6th Cir. 1947), cert. den. 331 U.S. 790, 91 L. Ed. 1819 (1947).

Interhandel also argued below that there was no *res* in the District of Columbia, but Judge Pine qualifiedly disagreed (JA 50).

[4] For the purposes of his decision, Judge Pine accepted as true the averments of both complaints.

no equitable lien that could be impressed upon it. The result is obviously the same.

Meticulously, the district judge examined the Settlement Agreement between Interhandel and the Attorney General (J.A. 59, esp. Sections VIII and IX, J.A. 66-69) outlining the indemnity features and the discretionary functions of the Attorney General, just as this Court did in *Kelberine* v. *Societe Internationale, etc.*, U.S. App. D.C. , , F. 2d (No. 19,286 decided April 7, 1966, petition for rehearing denied June 16, 1966). Then Judge Pine discussed the well known line of cases in the Supreme Court and in this Court[5] and applied their principles to the cases at bar in the following two paragraphs (J.A. 51-52):

> "Over the years there have been a number of actions of a similar character which have been filed in this court seeking to impress an equitable lien on a fund in the United States Treasury. Several have been taken to the Court of Appeals, and two to the Supreme Court. [The Judge then cites the four cases appearing in footnote 5 to this brief] It would needlessly burden this Opinion to discuss these cases separately, because the principle of law announced therein is unvarying and identical, and it is this: In order to impress an equitable lien upon a fund in the United States Treasury, it is necessary that there exist several elements, namely, the Treasury officials must be charged with the performance of no duty other than the ministerial duty of making disbursement of the fund. It must be such a duty as could be compelled by mandamus, or a receivership. The United States must not be in the position of a debtor or creditor, but the fund must be an especially earmarked account to which the Treasury officials are under no other responsibility than that of the ordinary stakeholder, and the United States must have no claim or interest in the fund.

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[5] *Houston* v. *Ormes*, 252 U.S. 469, 64 L. Ed. 667 (1920); *Mellon* v. *Orinoco Iron Company*, 266 U.S. 121, 69 L. Ed. 199 (1924); *Doerschuck* v. *Mellon*, 60 App. D.C. 383, 55 F. 2d 741 (1931); and *McCormack* v. *Harrah*, 60 App. D.C. 260, 51 F. 2d 316 (1931).

> "Applying these principles to the instant case, there would seem to be no doubt that these necessary elements are lacking. Here the United States has a direct and real interest, namely, the retention of the fund to indemnify it and certain federal officials from liability arising out of the sale of GAF stock. Here the defendant Secretary has no right to make any disposition of the fund except upon the order of the Attorney General. Here the Attorney General is not a party to the suit, and if he were, clearly his duties in connection with the fund are not ministerial but involve discretion. Here neither the United States nor defendant Secretary is a mere stakeholder, but he is holding the funds for the benefit of the United States. Here the action is clearly one against the United States which has not consented to be sued."

It would be sheer repetition to reargue the virtue and validity of Judge Pine's reasoning. In any event, the co-Appellee will doubtless cover the subject thoroughly in his own way.

Appellants' effort to distinguish *Kelberine* is without merit. True, no equitable lien was asserted in that case, but this Court held that the plaintiffs there could not maintain their suit against the government-official defendants because of its non-consented character and the discretionary functions involved. This is the threshold question here; and because of these principles, no equitable lien can be asserted against the fund in the Treasury. Hence, the same result is reached even if Appellant's circumstances create the factual basis for an equitable lien.

In the court below, Interhandel made a two-stage argument. The first is that a restricted or unavailable *res* is no *res* at all within the purview of the principles involved.[6]

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[6] In order to maintain the instant *in rem* action against Interhandel, Appellants have the burden to demonstrate that there is a *res* of which the Court can take control or possession, through a receiver or otherwise. *Kohagen* v. *Harwood*, 185 F. 2d 276 (7th Cir. 1950), 30 ALR 2d 201, and Annotation which follows. Clearly, this cannot be done here, for such is inconsistent with and contrary to Sections VIII and IX (JA 66-69) of the Stipulation of Settlement, which determine the character of the property here involved.

On this basis, the impressing of a lien becomes academic, since substituted service of process must fail. Secondly, again in order to sustain substituted service, even if there were a *res* present in this District, there must be a valid lien on or claim[7] to the *res*. The difference between Judge Pine's view and that of this Appellee, regarding a *res*, is purely theoretical, and as just stated, has no more than an academic interest.

An analysis of the foregoing res-equitable lien situation is submitted, as follows: There can be the most perfect *res* in the District of Columbia, e.g., funds in the Treasury entirely freed for administrative release, and yet if there is no equitable lien upon such funds, "an attachment" will not lie, since garnishment has a limited field where funds are held in a government department. Hence, an *in rem* proceeding against the alleged debtor cannot be maintained, since the *res* cannot be reached because there is no equitable lien. Conversely, the most perfect factual basis may exist in a plaintiff for an equitable lien, yet if the Government has a right to the funds—in this case a right to *all* of them—the action by the claimant is a non-consented suit against the United States, and the lien cannot be impressed. Thus, again, there is either no *res* in a technical sense, or there is no unrestricted or available *res*, and an *in rem* action may not be maintained.

These are the teachings of the cases cited in footnote 5, *supra*, and which were relied upon by Judge Pine in correctly dismissing the actions in their entirety. See, also, *Kohagen* v. *Harwood*, *supra*.

Appellants seek to avoid their barrier by contending that even though the fund is beyond the jurisdiction of the Court, they nevertheless have the right to assert a lien

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[7] "Claim", for example, as used in 28 USC 1655, does not have the ordinary dictionary definition. Its connotation is similar to that of a lien. *Vidal* v. *South American Secur Co.*, 276 F. 855 (2d Cir. 1921); *Kohagen* v. *Harwood*, *supra*. This would equally be so within Section 13-336(b)(7) D.C. Code (1961 Ed. Supp. V).

against it (Brief, pp. 19-21). Their thought seems to be that their alleged interest could be subordinated to that of the government. There is no authority for this proposition, which flies in the face of the cases relied upon by the lower court. For example, Appellants express comfort at the top of page 20 of their brief from the thesis that a government tax lien does not prevent the existence of liens subordinate to it. This is hardly analogous to the instant situation where jurisdiction of the Court is the first prerequisite.

Also, Appellants' citation of 40 U.S.C. Sections 308 and 309 (1958 ed. as amended) (Brief, p. 20) is equally unappealing. Judge Pine correctly dealt with this contention as follows (J.A. 53):

> "* * * I know of no juridical basis for such an action, but to support his position for a 'postponed' lien which in effect, as stated, is the assertion of a cause of action which does not *now* exist, but which may exist at some future time, he has referred to two sections of the United States Code, namely, 40 U.S.C. §§ 308, 309, and 28 U.S.C. § 2410. On its face, 40 U.S.C. § 308 does not furnish the requisite consent. It provides that 'nothing herein contained shall, however, be considered as recognizing or conceding any right to enforce by seizure, arrest, attachment, or any judicial process, any claim against any property . . . held . . . by the United States, or by any department thereof . . . or as waiving any objection to any proceeding instituted to enforce any such claim.' Section 309 is based upon § 308 and, consequently, likewise does not furnish consent. This statute also involves the exercise of discretion by the Secretary of the Treasury."[8]

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[8] Appellants' reliance upon 28 U.S.C. Section 2410, also rejected by Judge Pine (JA 53), has been abandoned in this Court.

CONCLUSION

The court below properly concluded that Appellants' complaints had to be dismissed. Its decision in all respects should be affirmed.

Respectfully submitted,

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August, 1966

APPENDIX

Pertinent Portions of Rule 4, Federal Rules of Civil Procedure

The pertinent portions of this Rule are as follows:

"(e) . . . SERVICE UPON PARTY NOT INHABITANT OF OR FOUND WITHIN STATE. Whenever a statute of the United States or an order of court thereunder provides for service of a summons . . . upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule . . .

"(i) ALTERNATIVE PROVISIONS FOR SERVICE IN A FOREIGN COUNTRY.

(1) Manner. When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of a summons and complaint is made: . . . (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served . . ."

Pertinent Portion of Section 13-336 D.C. Code (1961 Ed. Supp. V)

"SEC. 13-336. SERVICE BY PUBLICATION ON NONRESIDENTS, ABSENT DEFENDANTS, AND UNKNOWN HEIRS OR DEVISEES.

(a) In actions specified by subsection (b) of this section, publication may be substituted for personal service of process upon a defendant who cannot be found and who is shown by affidavit to be a nonresident. . . .

(b) This section applies only to:

* * *

(6) actions for the enforcement of mechanics' liens, and other liens against real or personal property within the District; and

(7) actions that have for their immediate object the enforcement or establishment of any lawful right, claim, or demand to or against any real or personal property within the jurisdiction of the court."

40 U.S. Code Sections 308 and 309

§ 308. *Releasing property from attachment*

Whenever any property owned or held by the United States, or in which the United States has or claims an interest, shall, in any judicial proceeding under the laws of any State, district, or territory, be seized, arrested, attached, or held for the security or satisfaction of any claim made against such property, the Attorney General, in his discretion, may direct the United States Attorney for the district in which the property is located, to cause a stipulation to be entered into for the discharge of such property from such seizure, arrest, attachment, or proceedings, to the effect that upon such discharge, the person asserting the claim against such property shall become entitled to all the benefits of this section and section 309 of this title. Nothing herein contained shall, however, be considered as recognizing or conceding any right to enforce by seizure, arrest, attachment, or any judicial process, any claim against any property of the United States, or against any property held, owned, or employed by the United States, or by any department thereof, for any public use, or as waiving any objection to any proceeding instituted to enforce any such claim.

§ 309. *Payment*

In all cases where a stipulation is entered into under section 308 of this title, and, in consequence thereof, the property is discharged, and final judgment is afterward given in the court of last resort to which the Attorney General may deem proper to cause such pro-

ceedings to be carried, affirming the claim for the security or satisfaction of which such proceedings have been instituted, and the right of the person asserting the same to enforce it against such property by means of such proceedings, notwithstanding the claims of the United States thereto, such final judgment shall be deemed, to all intents and purposes, a full and final determination of the rights of such person, and shall entitle such person, as against the United States, to such rights as he would have had in case possession of such property had not been changed. Whenever such claim is for the payment of money, and the same is by such judgment found to be due, the presentation of a duly authenticated copy of the record of such judgment and proceedings shall be sufficient evidence to the proper accounting officers for the allowance thereof; and the same shall thereupon be allowed and paid out of any moneys in the Treasury not otherwise appropriated. The amount so to be allowed and paid shall not, however, exceed the value of the interest of the United States in the property in question.